A TREATISE

ON THE

POWER AND DUTY

OF AN

ARBITRATOR,

AND THE LAW OF

SUBMISSIONS AND AWARDS;

WITH AN

APPENDIX OF FORMS, AND OF THE STATUTES RELATING TO ARBITRATION.

BY

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"Esto bonus miles, tutor bonus, arbiter idem
Integer."

Juv. 8 Sat. l. 79.

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TO

THE RIGHT HONORABLE

THOMAS LORD DENMAN,

LORD CHIEF JUSTICE OF THE COURT OF QUEEN'S BENCH,

IN TOKEN OF THE

AUTHOR'S SINCERE RESPECT AND ESTEEM,

THIS WORK IS, BY PERMISSION,

DEDICATED.

PREFACE.

SOME years ago it occurred to the author that a book written with a view to elucidate the extent of the powers and duties of an Arbitrator, would be useful. The valuable works then existing on the subject of awards did not seem addressed exactly to that object; and since the publication of the then latest of them, a large number of cases relating to arbitration had been decided in the courts. Under those circumstances, the present work was commenced; and though the author has been anticipated in his expectation of being the first to present the effect of those decisions before the public, he has been encouraged to complete his undertaking, in the belief that there is still room for a work written with the view contemplated above. As a further distinction, and, he trusts, recommendation, he would add, that the following pages embody the substance of important parliamentary enactments not hitherto noticed in works on awards; and, he believes, every case of any interest on the subject of Arbitration up to the end of Michaelmas Term of the present year is referred to in the Treatise or in the Addenda.

Hoping these considerations will relieve him from the charge of presumptuously entering upon ground already fully occupied, he proceeds at once to state the course which he has pursued.

The present treatise is divided into three parts.

In the second, or principal part, the author has endeavoured to set forth an exposition of the law of arbitration, so far as it concerns the Arbitrator's powers and duties, and to arrange it so as to show him how he may best exercise the one and perform the other. It treats also of the privileges and liabilities of an Arbitrator.

To these objects the inquiry was originally intended to have been confined: but as the Arbitrator's functions vary materially with the varying terms of the submission to reference, it was found incumbent to enter into a more detailed investigation respecting the submission: and the result of that research, so far as it primarily affects other parties than the Arbitrator, has been prefixed in the first or preliminary part; in the hope of assisting parties to select that mode of arbitration best suited to their particular circumstances.

The third part, respecting the effect of awards, and the modes of enforcing and setting them aside, was added from a desire to make the work in a measure complete as a treatise on awards, as well as on Arbitrators. Unfortunately this part of the subject has far exceeded the contemplated limits.

A variety of Precedents and of Forms of Proceedings relating to Arbitration has been subjoined in the Appendix of Forms.

In this Appendix, for the sake of convenient perusal and selection, a large number of clauses capable of being beneficially introduced into submissions is collected together under Form I.: so with regard to awards, clauses showing the modes of awarding on a great variety of matters are all comprised under Form LXVIII, the first under the head of awards. There are also contained forms for proceedings as to references respecting the compensation to be

paid to persons, whose lands are taken under the authority of Parliament for the purposes of a Railway or other Public Undertaking.

For many forms in the Appendix the author has to express himself indebted to the kindness of legal friends, and to the courtesy of the officers of the courts of law, and more particularly of Mr. Hill and Mr. Kemp, of the Rule Office of the Court of Queen's Bench; and he wishes especially to acknowledge his obligations to Mr. P. W. Rogers, of the Registrar's Office of the Court of Chancery, for affording him much valuable information on points of Chancery practice, for furnishing him with various forms used in Chancery in proceedings connected with arbitrations, and for kindly drawing up the tabular statement of the modes of enforcing awards in Equity, which appears as Form CIV., p. 805.

Recent legislation having so widely enlarged the field of arbitration, especially by means of "The Lands Clauses Consolidation Act, 1845," "The Railways Clauses Consolidation Act, 1845," "The Companies Clauses Consolidation Act, 1845," and "The Public Health Act, 1848," it has been thought advisable to add, in a further Appendix, the arbitration clauses of those Acts, and the other principal Statutes and sections of Statutes relating to Arbitration. With a view, moreover, to the assistance of Arbitrators, especially of those who are unconnected with the profession of the Law, the effect of the principal statutable provisions (except those of "The Public Health Act," which was passed too recently to admit of it,) has, as before stated, been incorporated in the body of the Treatise.

In conclusion, the author hopes, as he has not spared time or labor in the endeavour to make his book worthy of favor, that its errors and deficiencies will be noted with indulgence; that it will be found useful and acceptable to

the Public and the Profession; and more especially that it will prove serviceable to those, who are called upon to fill the office of Arbitrator.

FRANCIS RUSSELL.

2, *Fig Tree Court, Temple.*
December 1, 1848.

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(*a*) A like form has been used in the case of Lee v. Austen, V. C. E. 5th August, 1848. E. D. C. Reg.

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TABLE OF ABBREVIATIONS

OF TITLES OF WORKS CITED.

A. & E. - -	Adolphus & Ellis' Reports, King's Bench. [1834—1840].
A. & E., N. S. -	Adolphus & Ellis Reports, New Series, or Queen's Bench Reports. [1841—continuing].
Al. - - -	Aleyn's Reports, King's Bench. [1646—1648].
Amb. - - -	Ambler's Reports, Chancery. [1737—1783.]
Andr. - -	Andrew's Reports, King's Bench. [1737, 1738].
Atk. - - -	Atkyns' Reports, Chancery. [In the time of Lord Chancellor Hardwicke].
B. & A. - -	Barnewall & Alderson's Reports, King's Bench. [1817—1822].
B. & Ad. - -	Barnewall & Adolphus' Reports, King's Bench. [1830—1834].
B. & B. - -	Broderip & Bingham's Reports, Common Pleas. [1819—1822].
B. & C. - -	Barnewall & Cresswell's Reports, King's Bench. [1822—1830].
B. & P. - -	Bosanquet & Puller's Reports, Common Pleas. [1797—1804].
B. & P., N. R. -	Bosanquet & Puller's New Reports, Common Pleas. [1804—1807].
Bac. Ab. Arb. -	Bacon's Abridgment, title Arbitrament.
Ball & Beatty -	Ball & Beatty's Reports, Chancery, Ireland. [1807—1811].
Barnard. - -	Barnardiston's Reports, King's Bench. [1726—1741].
Barnes - -	Barnes' Notes of Practice Cases, Common Pleas. [1732—1760].
Beav. - - -	Beavan's Reports, Rolls. [1838—continuing]
Bing. - - -	Bingham's Reports, Common Pleas. [1822—1834].
Bing. N. C. -	Bingham's New Cases, Common Pleas. [1834—1840].
Black. Comm. -	Blackstone's Commentaries on the Laws of England.
Bligh - - -	Bligh's Reports, House of Lords. [1819—1821].
Bligh, N. S. -	Bligh's Reports, New Series, House of Lords. [1827—1837].
Bott - - -	Bott's Poor Laws.
Bro. C. C. -	Brown's Chancery Cases, Chancery. [1778—1794].
Bro. P. C. -	Brown's Parliamentary Cases. [1702—1800].
Brooke -	Brooke's Abridgment.

Brownl. - -	Brownlow & Goldesborough's Reports, Common Pleas. Printed, 3rd ed., 1675.
Bulst. - - -	Bulstrode's Reports, King's Bench. [1609—1625].
Burr. - - -	Burrow's Reports, King's Bench. [1756—1772].
Burr. S. C. - -	Burrows' Settlement Cases, King's Bench. [1732—1776].
C. & F. - -	Clarke & Finelly's Reports, House of Lords. [1831—continuing].
C. & J. - -	Crompton & Jervis' Reports, Exchequer and Exchequer Chamber. [1830—1832].
C. & M. - -	Crompton & Meeson's Reports, Exchequer and Exchequer Chamber. [1832—1834].
C. & P. - -	Carrington & Payne's Reports, Nisi Prius. [1823—1841].
C. B. - - -	Common Bench Reports, Common Pleas. [1845—continuing].
C. M. & R. - -	Crompton, Meeson, & Roscoe's Reports, Exchequer and Exchequer Chamber. [1834, 1835].
Cald. - - -	Caldecott's Reports, Magistrates' cases. [1776—1785].
Camp. - - -	Campbell's Reports, Nisi Prius. [1807—1816].
Carth. - - -	Carthew's Reports, King's Bench. [1688—1699].
Cas. in Chanc. -	Cases in Chancery. [1660—1697].
Cas. in Eq. Ab. -	Cases in Equity Abridged.
Cas. temp. Finch -	Reports of cases in Chancery in the time of Sir Heneage Finch, Lord Chancellor. [1673—1680].
Cas. temp. Hardw.	Cases in the time of Lord Hardwicke, King's Bench. [1733—1738].
Chanc. Rep. - -	Reports in Chancery. [1615—1710]
Chitt. or Ch. - -	Chitty's Reports, King's Bench. [1782—1819].
Chitt. Pl. - -	Chitty on Pleading.
Co. Litt. - -	Coke upon Littleton.
Code de Proc. Civ.	Code de Procedure Civile.
Colles' Parl. Cas. -	Colles' Cases in Parliament. [1697—1709].
Coll. cas. in Chanc. V. C. K. B. -	Collyer's Cases in Chancery, before Vice-Chancellor Knight Bruce. [1844—continuing].
Com. Dig. Arb. -	Comyn's Digest, title Arbitrament.
Com. Rep. - -	Comyn's Reports. [1697—1739].
Comb. - - -	Comberbach's Reports, King's Bench. [1685—1698].
Coop. - -	Cooper's Reports, Chancery. [1815].
Coop. C. C. - -	Cooper's Cases in Chancery. [1846—continuing].
Coop. Eq. Pl. -	Cooper's Equity Pleading.
Cowp. - - -	Cowper's Reports, King's Bench. [1774—1778]
Cox - - -	Cox's Cases in Chancery. [1783—1796].
Cro. Car. - -	Croke's Reports, King's Bench and Common Pleas, in the time of Charles I.
Cro. Eliz. - -	Croke's Reports, King's Bench and Common Pleas, in the time of Elizabeth.
Cro. Jac. - -	Croke's Reports, King's Bench and Common Pleas, in the time of James I.
Cromp. - -	Crompton's (Geo.) Practice, Common Placed.
D. & L. - -	Dowling & Lowndes' Reports, Bail Court, Common Pleas, and Exchequer. [1843—continuing].
D. & R. - -	Dowling & Ryland's Reports, King's Bench. [1822—1827].
Dan. Ch. Pr. Headlam - - -	Daniell's Chancery Practice, by Headlam. [1845].
Deac. & Ch. - -	Deacon & Chitty's Reports, Bankruptcy. [1832—1835].
Dick. - - -	Dickens' Reports, Chancery. [1559—1784].
Dig. - - -	Digests or Pandects of Justinian.

Domat - - -	Domat's Lois Civiles.
Dow - - -	Dow's Reports, House of Lords. [1813—1818].
Dow, N. S. - -	Dow's Reports, New Series, House of Lords. [1827—1830].
Dowl. - - -	Dowling's Reports, Practice Cases, Bail Court, Common Pleas, and Exchequer. [1830—1841].
Dowl. N. S. - -	Dowling's Practice Cases, New Series, Bail Court, Common Pleas, and Exchequer. [1841—1843].
Dru. & War. - -	Drury and Warren's Reports, Irish Chancery. [1841—1843].
Dyer - - -	Dyer's Reports in the time of Henry VIII., Mary, and Elizabeth.
East - - -	East's Reports, King's Bench. [1809—1812].
Eden - - -	Eden's Chancery Cases. [1757—1766].
Eq. Cas. Ab. - -	Cases in Equity Abridged.
Erskine's Institutes	Erskine's Principles of the Laws of Scotland.
Esp. - - -	Espinasse's Reports, Nisi Prius. [1793—1807].
Ex. R. - - -	Exchequer Reports, Exchequer & Exchequer Chamber. [1847—continuing].
F. Moore - -	Sir Francis Moore's Reports, temp. Henry VII.—James I.
Fitzg. - - -	Fitzgibbon's Reports, King's Bench. [1727—1731.]
Fitzherbert, Ab. -	Fitzherbert's Abridgment. [1577].
Forrest - -	Forrest's Reports, Exchequer. [1800, 1801].
Freem. - -	Freeman's Reports, King's Bench & Common Pleas, [1670—1704].
Gale - - -	Gale's Reports, Exchequer. [1835, 1836].
Godb. - - -	Godbolt's Reports. [1573—1637].
Gow, N. P. C. -	Gow's Nisi Prius Cases. [1818—1820].
H. & W. - -	Harrison & Wollaston's Reports, King's Bench & Bail Court. [1835, 1836].
H. Bl. - - -	Henry Blackstone's Reports, Common Pleas & Exchequer Chamber. [1788—1796].
Hard. - - -	Hardres' Reports, Exchequer. [1655—1668].
Hare - - -	Hare's Cases in Chancery, V.-C. Wigram. [1841—continuing.]
Harr. Woodf. -	Harrison's Woodfall's Landlord & Tenant.
Hob. - -	Hobarts' Reports, Common Pleas, temp. James I.
Hodges - -	Hodges' Reports, Common Pleas. [1835—1837].
J. & W. - -	Jacob & Walker's Reports, Chancery. [1819—1821].
Jarman & Bythewood Conv. -	Jarman & Bythewood's Conveyancing.
Jenk. - - -	Jenkins' Reports, Exchequer Chamber, from temp. Henry III. to James I.
Jones & Latouche -	Jones & Latouche's Reports, Chancery (Ireland). [1844—continuing].
Jur. - - -	Jurist. [1837—continuing].
Keb. - - -	Keble's Reports, King's Bench. [1660—1676].
Keilwey - -	Reports by Keilwey, temp. Henry VII., Henry VIII.
Knapp Pr. Council Rep. - -	Knapp's Privy Council Reports. [1829—1836].
L. J., C. P. - -	Law Journal Reports, Common Pleas. [1831—continuing].
L. J., Ch. - -	Law Journal Reports, Chancery. [1831—continuing.]

L. J., Ex.	Law Journal Reports, Exchequer. [1831—continuing].
L. J., Q. B.	Law Journal Reports, Queen's Bench. [1831—continuing].
Latch	Latch's Reports, King's Bench, temp. Charles I.
Ld. Kenyon	Lord Kenyon's Reports, King's Bench, &c. [1753—1759].
Ld. Raym.	Lord Raymond's Reports, King's Bench & Common Pleas. [1695—1732].
Leon.	Leonard's Reports, temp. Elizabeth & James I.
Lev.	Levinz' Reports, King's Bench & Common Pleas. [1660—1697].
Litt.	Littleton's Reports, Common Pleas & Exchequer. [1627—1631].
Lofft	Lofft's Reports, King's Bench, &c. [1772, 1773].
Lutw.	Lutwyche's Reports and Entries, Common Pleas, &c. [1682—1703].
M. & C.	Mylne & Craig's Reports, Chancery & Rolls. [1835—1840].
M. & G.	Manning & Granger's Reports, Common Pleas. [1840—1844].
M. & K.	Mylne & Keene's Reports, Chancery & Rolls. [1832—1835].
M. & P.	Moore & Payne's Reports, Common Pleas & Exchequer Chamber. [1827—1831].
M. & R.	Manning & Ryland's Reports, King's Bench. [1827—1830].
M. & S.	Maule & Selwyn's Reports, King's Bench. [1813—1817].
M. & Sc.	Moore & Scott's Reports, Common Pleas, Exchequer Chamber, and House of Lords. [1831—1834].
M. & W.	Meeson & Welsby's Reports, Exchequer & Exchequer Chamber. [1836—1847].
Madd.	Maddock's Reports, Vice-Chancellor. [1815—1822].
Madd. Chanc. Pract.	Maddock's Chancery Practice.
March	March's Reports. [1640—1642].
Marsh.	Marshall's Reports, Common Pleas. [1813—1816].
M'Lel.	M'Leland's Reports, Exchequer & Exchequer Chamber. [1824].
M'Lel. & Y.	M'Leland & Younge's Reports, Exchequer and Exchequer Chamber. [1824, 1825].
Mitf. Plead. in Chanc.	Mitford's Pleadings in Chancery.
Mod.	Modern Reports. [1660—1701].
Molloy	Molloy's Reports (Irish), Chancery. [1827—1829].
Moo. & M.	Moody & Malkin's Nisi Prius Reports. [1826—1830].
Moo. & Rob.	Moody & Robinson's Reports, Nisi Prius. [1837—1844].
Moor.	Sir Francis Moore's Reports, temp. Henry VII.—James I.
Moore	Moore's Reports, Common Pleas & Exchequer Chamber. [1817—1827].
N. & M.	Nevile & Manning's Reports, King's Bench. [1832—1836].
N. & P.	Nevile & Perry's Reports, Queen's Bench. [1836—1838].
N. S. C.	New Sessions Cases, Queen's Bench, Magistrates' Cases. [1844—continuing].
Noy	Noy's Reports, temp. Eliz.—Charles I.
Owen	Owen's Reports, temp. Elizabeth and James I.
P. W.	Peere William's Reports, Chancery, &c. [1695—1735]
Palm.	Palmer's Reports, King's Bench. [1619—1628].
Peake, N. P. C.	Peake's Nisi Prius Cases. [1790—1806].
Phill.	Phillips' Reports, Chancery. [1841—continuing].
Pop.	Popham's Reports, temp Eliz.—Charles I.
Pract. Reg.	Practical Register of the Common Pleas, temp. Anne—George II.

Prec. in Ch.	Precedents in Chancery. [1689—1722].
Price	Price's Reports, Exchequer. [1814—1824].
Q. B.	Queen's Bench Reports, or Adolphus & Ellis' New Series. [1841—continuing].
Reg. Gen. H. T. 2, W. IV.	Regulæ Generales, Hilary Term, 2nd William IV.
Rep.	Lord Coke's Reports, temp. Eliz. & James I.
Rep. in Chanc.	Reports in Chancery. [1615—1710].
Rolle Ab. Arb.	Rolle's Abridgment, title Arbitrement.
Rolle Rep.	Rolle's Reports, King's Bench, temp. James I.
Rose	Rose's Reports, Bankruptcy. [1810—1816].
Russ.	Russell's Reports, Chancery. [1826—1829].
Russ. & M.	Russell & Mylne's Reports, Chancery. [1829—1831].
Ry. & M.	Ryan & Moody's Reports, Nisi Prius. [1823—1826].
S. & S.	Simons and Stuart's Reports, Vice-Chancellor. [1822—1826].
Salk.	Salkeld's Reports, King's Bench, &c. [1689—1711].
Saund.	Saunder's Reports, King's Bench. [1666—1671].
Sayer	Sayer's Reports, King's Bench. [1752—1756].
Scott	Scott's Reports, Common Pleas & Exchequer Chamber. [1834—1840].
Scott, N. R.	Scott's New Reports, Common Pleas & Exchequer Chamber, [1840—1845].
Show.	Shower's Reports, King's Bench. [1678—1693].
Sid.	Siderfin's Reports. [1660—1670].
Sim.	Simons' Reports, Vice-Chancellor. [1826—continuing].
Skin.	Skinner's Reports, King's Bench. [1680—1697].
Smith	Smith's Reports, King's Bench, &c. [1803—1806].
Stark.	Starkie's Reports, Nisi Prius. [1814—1823].
Stra.	Strange's Reports. [1716—1747].
Sty.	Styles' Reports, King's Bench. [1646—1655].
Sug. Vend. & Purch.	Sugden's Vendors & Purchasers.
Swanst.	Swanston's Reports, Chancery. [1818, 1819].
T. R.	Term Reports, or Durnford & East's Reports, King's Bench. [1785—1800].
T. Jones	Sir Thomas Jones' Reports, King's Bench and Common Pleas, temp. Charles II.
T. Raymond	Sir Thomas Raymond's Reports. [1660—1672].
Taml.	Tamlyn's Reports, Rolls. [1829, 1830].
Taunt.	Taunton's Reports, Common Pleas, &c. [1807—1819].
Tidd. Pr.	Tidd's Practice.
Turn. & R.	Turner & Russell's Reports, Chancery. [1822—1824].
Tyr. *or* Tyrw.	Tyrwhitt's Reports, Exchequer & Exchequer Chamber. [1830—1835].
V. & B.	Vesey & Beame's Reports, Chancery. [1812—1814].
Vent.	Ventris' Reports, King's Bench & Common Pleas. [1669—1691]
Vern.	Vernon's Reports, Chancery. [1680—1719.]
Ves.	Vesey's Reports, or Vesey Junior's Reports, Chancery. [1789—1817].
Ves. Sr.	Vesey Senior's Reports, Chancery. [1746—1755].
Vin. Ab.	Viner's Abridgment.
W. Bl.	Sir William Blackstone's Reports. [1746—1779].
W. Jones	Sir William Jones' Reports, temp. James I. & Charles I.
W. W. & D.	Willmore, Wollaston, & Davison's Reports, King's Bench. [1837].

Went. Off. Ex.	Wentworth's Office of Executors
West. Symb.	West's Symboliography.
Willes	Willes' Reports, Common Pleas, &c. [1737—1758].
Wils.	Wilson's Reports, King's Bench and Common Pleas. [1742—1774].
Wils. C. C.	Wilson's Chancery Reports. [1817—1819].
Y. & C.	Younge & Collyer's Reports, Exchequer, Equity. [1834—1842].
Y. & C., V. C., K. B.	Younge & Collyer's Reports, Vice-Chancellor Knight Bruce. [1841—continuing].
Y. & J.	Younge & Jervis' Reports, Exchequer & Exchequer Chamber. [1826—1830].
Yelv.	Yelverton's Reports, King's Bench. [1602—1611].

ADDENDA AND CORRIGENDA.

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32, insert in note (*g*), "See Faviell v. East. Count. Railway Comp. L. J., Exch. 223, 297."

34, insert in note (*t*), "See Faviell v. East. Count. Railway Comp., L. J., Exch. 223, 297, cited post, 597."

93, in last line, *for* "7 & 8 Vict. c. 93," *read* "7 & 8 Vict. c. 83."

141, *for* "s. 2, 3," in note (*s*), *read* "s. 23."

142, insert in note (*z*), "Hawksworth v. Brammall, 5 M. & C. 281."

145, insert in note (*l*), "Recognized and affirmed in Bowen v. Williams, Nov. 24, 1848, Exch."

145, insert in note (*m*), "But in Leslie v. Richardson, July 8, 1848, 12 Jur. 730, the Court of C. P. decided, that where an arbitrator who has enlarged the time for making his award under the power given him by the submission, allows the enlarged time to expire before making his award, the court can further enlarge the time under the statute."

146, insert as a note to the first paragraph, "Hall v. Rouse, 4 M. & W. 24, per Parke, B. 26; Parberry v. Newnham, 7 M. & W. 378; S. C. 9 Dowl. 288; Leslie v. Richardson, 12 Jur. 730; Bowen v. Williams, Exch. Nov. 24, 1848."

146, insert in note (*o*), "A judge's order under the statute enlarging the time for the arbitrators to award applies to the umpire. Bowen v. Williams, Exch. Nov. 24, 1848."

202, insert in note (*f*), "Where pending the reference the parties agreed to refer certain items to an engineer whose report the arbitrator was to adopt as final, and the award stated that the arbitrator had adopted the report, there is no ground on that account for impeaching the award. Sharp v. Noel, May 8, 1848, C. P., Law Times, June 17, 1848, p. 242."

210, insert in note (*m*), "See Wright v. Graham, Exch. Nov. 25, 1848, acc."

226, insert in note (*m*), "A judge's order enlarging the time for the arbitrators to award extends the umpire's time also. Bowen v. Williams, Exch. Nov. 24, 1848."

252, insert in note (*f*), "Hawksworth v. Brammall, 5 M. & C. 281."

272, line 27, *for* "revocation," *read* "reservation."

335, insert the following cases at the end of the page, after the case of East & West India Docks & Birmingham Junction Railway Company & Bradshaw, In re, 17 L. J., Q. B. 362.

"The N. S. Railway Company gave notice to certain trustees that they required certain lands for the purposes of their railway. The trustees wrote in answer, stating, 'We hereby give you notice that we have and claim an estate and interest in certain copyhold lands,' [the lands specified], 'and that we claim compensation for the said lands and hereditaments' [specifying the amount]; 'and we do hereby signify our desire to have the same compensation settled by arbitration, and we do hereby nominate and appoint A. B. one of the arbitrators in the premises,' &c. In the appointment of an arbitrator by the company the question referred was stated to be 'as to the amount of compensation to be paid by the said company for the purchase of the said lands and hereditaments, or of the interest of the said [the trustees], or of the interest of any other person or persons' which the trustees were enabled to sell, and also for damage, &c. Before the arbitrators, a third party claimed compensation from the company as lessee for a term of years of the lands in question. The umpire awarded, that '1861*l.* 2*s.* 6*d.* is the value, and shall be paid by the N. S. R. Company to [the trustees], as such trustees as aforesaid, for the purchase of the fee simple in possession free from incumbrances of and in the said copyhold lands,' &c. He also awarded a further sum for severance and damage. It was objected, that

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the appointment of the arbitrator by the trustees was defective under the statute; that the award did not state the amount of the compensation to be paid for the interest of the trustees; and that there were no means of ascertaining how much of the sum awarded for the fee simple was to be paid in respect of the lessee's interest, and how much for that of the trustees. The court considering the validity of the award only doubtful, refused to set it aside, and observed, that though the submission was not according to the statute, and though the umpire had not decided rightly on the question of the fee simple, the award might possibly be binding by reason of the conduct of the parties amounting to a parol submission. North Staffordshire Rail. Comp. & Landor, In re, May 4, 1848; 17 L. J., Exch., Dec. 350."

"Where a landowner claims compensation, not only for the land required by the Railway Company, but also for other small parcels of land which the company are bound to purchase at his request, and appoints his arbitrator to assess it; and the company appoint their arbitrator to assess the compensation only as to the lands required by them, an award awarding one gross sum stated to be for the value of the lands required by the company, and of the small parcels which the landowner calls on them to purchase, is bad under the statute, though the court will not set it aside, if it is doubtful whether by reference to the conduct of the parties it may not be sustained. North Staffordshire Railway Company & Wood, In re, May 4, 1848; 17 L. J., Exch., 354."

492, insert in note (*e*), "If the reference is to two arbitrators, who by writing indorsed on the submission are to appoint a third arbitrator to act with them, a declaration alleging that the two by writing appointed a third to act with them, is bad on general demurrer if it does not state that they appointed him by writing 'indorsed on the submission.' Bates v. Townley 1 Ex. R. 572."

525, insert in note (*b*), "Auriol v. Smith, 1 Turn. & R. 121; Hawksworth v. Brammall, 5 M. & C. 281."

563, insert in note (*s*), "If an award orders the plaintiff to repay to the defendant any sum the defendant may be compelled to pay in respect of a certain bill of exchange, and the defendant afterwards is obliged to pay the holder of the bill, repayment pursuant to the award cannot be enforced by attachment. Graham v. Darcey, C. P., Nov. 14, 1848, 12 Law Times, 149."

579, insert in note (*r*), "See Wright v. Graham, Exch., Nov. 25, 1848, acc."

594, insert in note (*s*), "If an award orders the plaintiff to repay to the defendant any sum the defendant may be compelled to pay in respect of a certain bill of exchange, and the defendant afterwards is obliged to pay the holder of the bill, a rule of court will not be granted to enforce repayment pursuant to the award. Graham v. Darcey, C. P., Nov. 14, 1848. 12 Law Times, 149."

"On showing cause against a rule to pay a sum awarded on a reference by judge's order, the court refused to allow the pleadings in the cause to be brought before them by affidavit, so as to raise an objection as to the award finding inconsistently on the issues, saying that on such a motion they could not look at any matter but what appeared on the submission and award; but it appearing by the affidavits that the award was executed by two of the arbitrators on one day, and by the third on another day, they allowed an objection to be raised as to the mode of execution, and discharged the rule, saying that the point as to the validity of the execution of the award was too nice for the court to settle it on a motion, which was, in fact, similar to an application for an attachment, and that the parties must be left to raise it by an action. Wright v. Graham, Exch., Nov. 25, 1848."

716, insert as a note to Form XXII., "See Lee v. Austen, V. C. of E., 5 Aug. 1848, E. D. C. Reg.

800, insert as a note to Form XCVI., "See Ex parte, Clarke, deceased, V. C. K. B. Aug. 1, 1846; Fisher v. Mackrell, V. C. of E., 14 Jan. 1846, H. H. Reg.; Turnley v. Barber, L. C. 31 July. 1846, E. D. C. Reg.; Fradley v. Haslam, M. R., 1 Ap. 1847, J. C. Reg."

PART THE FIRST.

PART THE FIRST.

The Submission.

Statement of the object and contents of the first part.

THIS first part, which is introductory to the main object of this work, namely, the exposition of the duty of an arbitrator, is occupied with the consideration of the agreement by which parties agree to submit their differences to the decision of an arbitrator. An agreement of this sort is termed a submission to arbitration; or, more simply, a submission. A preliminary inquiry into its nature is necessary, since it is the submission alone that invests the arbitrator with authority, defines his duties, and is the foundation of all his proceedings. The several chapters therefore, of this part, are employed in investigating, what matters may form the subject of a submission, who may the parties be that contract, and what are the various modes of effecting it.

CHAPTER I.

WHAT MATTERS MAY BE REFERRED TO THE DECISION OF AN ARBITRATOR.

Subject of the first chapter.

IN this chapter it is proposed to consider what are the subjects on which an arbitrator may be called upon to award. The first section enumerates the civil interests over which his jurisdiction may be extended, the second section discusses the propriety of submitting to his decision matters and proceedings of a criminal character.

SECTION I.

MATTERS AFFECTING THE CIVIL INTERESTS OF THE PARTIES.

All matters concerning personal chattels, or personal wrongs.

1. *Civil rights of the parties.*]—All matters in dispute concerning any personal chattel or personal wrong may be referred to the decision of an arbitrator (*a*). Thus breaches of contracts generally, breaches of promise of marriage (*b*), trespass, assaults, charges of slander(*c*), differences respecting partnership transactions (*d*), or the purchase price of

(*a*) Bac. Ab. Arb. A.; Blake's case, 6 Rep. 43; Black. Comm. iii. 15, 15th ed. Baker v. Townshend, 1 Moore, 120, S. C. 7 Taunt. 422.

(*b*) 16 Ed. IV. 2. pl. 6.

(*c*) Linch v. Dacy, 1 Keb. 848.

(*d*) Hewitt v. Hewitt, 1 Q. B. 110; Wilkinson v. Page, 1 Hare, 276; Waters v. Taylor, 15 Ves. 10.

property (*e*), and questions relating to tolls (*f*), or the right to tithes (*g*), may all be the subjects of a reference.

Debts certain.

Debts certain, according to the old authorities, are not submissible, because it is said to be the design of an arbitrator to reduce uncertain debts and duties to a certainty, and that to award a man a certain debt, is to give him no more nor to do any greater thing for him than was done before (*h*). They accordingly lay down the rule that only things of an uncertain nature can be submitted to arbitration (*i*), and hold that no reference can be made of a debt on bond (*k*), of arrears of rent ascertained by a lease (*l*), or of damages recovered by verdict and judgment (*m*), because they are certain before the submission. And on this ground an attempt was made to set aside an award, where the submission was respecting 72*l.* due for rent, and the arbitrator awarded 60*l.* in satisfaction of the 72*l.* The court, however, held, that as the 72*l.* was only demanded, not admitted to be due, the award was good (*n*).

Debts of record.

Though an action of account which is uncertain may be referred, yet a debt for arrearages of account taken before auditors cannot, it is said, be discharged by award, for the above reason that it is a debt certain, and also because it appears of record, and must be discharged by matter of as high a nature (*o*). However, when joined with other matters, a debt certain as a debt on specialty or record may be submitted, for then, as the submission is entire, the whole matter submitted is uncertain (*p*).

Submissible with other things.

(*e*) Round v. Hatton, 2 Dowl. N. S. 446.

(*f*) Allen v. Milner, 2 C. & J. 47.

(*g*) Prosser v. Goringe, 3 Taunt. 425.

(*h*) Rolle Ab. Arb. R. 2; Bac. Ab. Arb. A.

(*i*) Com. Dig. Arb. D. 3.

(*k*) Com. Dig. Arb. D. 3; Morris v. Creach, 1 Lev. 292.

(*l*) Bac. Ab. Arb. A.

(*m*) Bac. Ab. Arb. A.

(*n*) Godfrey v. Godfrey. 2 Mod. 303.

(*o*) Bac. Ab. Arb A.; Rolle Ab. Arb. R. 1, 4.

(*p*) Com. Dig. Arb. D. 3; Rolle Ab. Arb. R. 3, 5; but see Rolle Ab. Arb. R. 6, semble contrà, where the debt certain is a matter of record. See, also, Luddington v. White, Styles, 350.

Matters concerning real property.

Real property stands on a somewhat different footing from personal property as a subject of arbitration. This arises from the interest the lord in feudal times had that the land should not be aliened collusively without his consent(*q*). To prevent which it was held that neither freehold or inheritance could be determined by arbitrament(*r*). But it was also held that the arbitrator might direct one party to infeoff the other (*s*), or to release his right to the land (*t*), and that it would be a breach of the arbitration bond to refuse compliance (*u*). Even so late as the reign of William the Third, Powell, Judge, is reported to have said, "It is a question whether title to land is submissible, since it is in the realty." But the answer was given to that observation by Treby, C. J., "that things in the realty might be submitted as well as in the personalty, but they could not be recovered upon the award (*x*). It is clear that a partition of the lands of joint tenants (*y*), or tenants in common (*z*), may be made by an arbitrator, and that settlements of disputed boundaries (*a*), of questions between landlord and tenant respecting waste (*b*), of title to land by devise (*c*), and of title to land in general (*d*), may all now be effected by arbitration.

The practical distinction seems this, that though an arbitrator can transfer a right to personal property by his decision, if afterwards assented to and acted upon by the parties, yet owing to a subtlety of form arising from feudal principles, a right to real property cannot pass by the mere award, but the arbitrator must award a release or a conveyance (*e*).

Questions of law.

Pure questions of law, as for instance a demurrer, may be

(*q*) Black. Comm, vol. iii. 15, 15th ed.
(*r*) Com. Dig. Arb. D. 3; Rolle Ab. Arb. V.
(*s*) Rolle Ab. Arb. E. 2, F. 9.
(*t*) Rolle Ab. Arb. B. 14, K. 15.
(*u*) Black. Comm. iii. 15. 15th ed.
(*x*) Marks v. Marriott, 1 Ld. Raym. 114.
(*y*) Knight v. Burton, 6 Mod. 231.
(*z*) Johnson v. Wilson, Willes, 248.
(*a*) Taylor v. Parry, 1 M. & G. 604.
(*b*) Hunter v. Rice, 15 East, 100.
(*c*) Downs v. Cooper, 2 Q. B. 256.
(*d*) Doe d. Morris v. Rosser, 3 East, 15.
(*e*) Bl. Comm. iii. 15; Hunter v. Rice, 15 East. 100; Thorpe v. Eyre, 1 A. & E. 926.

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referred to the decision of an arbitrator (*f*). So he may be called upon to determine the liability of a party on a promissory note (*g*), or to put his construction on an act of parliament (*h*), or on the effect of a will (*i*).

Actions at law and suits in equity.

All actions at law and suits in equity, excepting perhaps actions upon penal statutes by common informers (*k*), may be determined by arbitration.

The reference of an action may be made at any stage of the proceedings from the issuing of the writ (*l*) to the trial at Nisi Prius (*m*); sometimes, even after verdict. For on a motion by leave reserved to set aside a verdict taken by consent at a certain sum, the court referred it to an arbitrator to ascertain the amount of damages to which the plaintiff was entitled (*n*). And in another case, on a motion for a new trial in an action of trespass the same course was pursued to determine the ownership of some trees, the subject of the action (*o*). Contingent damages on a demurrer may be referred equally with damages on the issues in fact (*p*).

Claim barred by rule of practice.

A claim which a mere rule of practice prevents the courts from entertaining may be considered by an arbitrator.

Thus, on a reference of a chancery suit and all matters in difference, an arbitrator is justified in allowing interest on both sides of an unliquidated account, where it would not be allowed by the court (*q*).

Not matters illegal.

When the subject matter is clearly illegal, no binding award can be made.

(*f*) Ching v. Ching, 6 Ves. 281; Young s. Walter, 9 Ves. 364; Matthew v. Davis, 1 Dowl. N. S. 679.

(*g*) Wilkinson v. Page, 1 Har e, 276.

(*h*) Price v. Hollis, 1 M. & S. 105.

(*i*) Steff v. Andrews, 2 Madd. 6.

(*k*) 18 Eliz. c. 5.

(*l*) Rogers v. Dallimore, 6 Taunt. 111; Wynne v. Edwards, 1 D. & L. 976.

(*m*) Allenby v. Proudlock, 4 Dowl. 54.

(*n*) Thompson v. Jennings, 10 Moore, 110.

(*o*) Thompson v. Jennings, 10 Moore. 110.

(*p*) Cooper v. Langdon, 9 M. & W. 60.

(*q*) (In re) Badger, 2 B. & A. 691.

Thus, where a bill of exchange was accepted for a sum awarded due on illegal stock-jobbing transactions, the arbitrator to whom it had been indorsed was held not entitled to sue upon it (*r*).

Illegal items in account.

But where transactions between parties have been closed by a general award apparently good, the courts have refused to re-open them on a suggestion that some illegal item has been admitted in account.

Where it was sworn that the arbitrator had allowed in account premiums of insurance on an illegal voyage to an hostile port the court refused to interfere, and Gibbs, C. J., said, "Here is a dispute about a ship, and the defendant insists that as the plaintiff was a foreigner the whole affair was illegal. It may be so, but these are executory matters, and when such are referred and settled by arbitration the court will never set the award aside. The ground of the insurance also is one which the court cannot take into consideration" (*s*).

Future use of property.

The future conduct of parties with respect to the enjoyment of property, in matters beyond the power of any court to prescribe, is often submitted to the regulation of an arbitrator. Thus, an arbitrator has been called upon to set out what road one of the contending parties should have over certain lands (*t*), to determine with respect to such things as a pump, a yard, a doorway, a hedge and ditch (*u*), a flue, a watercourse, or a waterspout (*x*); how they shall in future be enjoyed and used, and even to say generally what shall be done by the parties respecting the matters in dispute (*y*).

Public and private rights by statute.

II. *Matters referred by statute.*]—It often happens that

(*r*) Steers v. Lashley, 6 T.R 61.

(*s*) Wohlenberg v. Lageman, 6 Taunt. 250; See Aubert v. Maze, 2 B. & P. 371, and Watts v. Brook, there cited. See Miller v. Robe, 3 Taunt, 461.

(*t*) Allenby v. Proudlock, 4 Dowl. 54.

(*u*) Boodle v. Davis, 3 A. & E. 200.

(*x*) Ross v. Clifton, 9 Dowl. 356.

(*y*) Wrightson v. Bywater, 3 M. & W. 199.

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private persons cannot deal with their respective interests in lands as they wish and as is desirable, in consequence of the disability to contract of some other parties interested, or of some public right affecting the property and preventing any alteration in it. The authority, therefore, of parliament, which can bind every one, and which alone can engage for the public, is frequently sought to authorise the submission to arbitration of all the interests concerned, public as well as private.

Inclosing commons, &c.

Commuting tithes, &c.

Thus, under the sanction of an act of parliament, the inclosing of commons, the allotment of lands, the determining compensation for rights of common, the setting out public roads, the commuting tithes, the defining boundaries, and the otherwise modifying public and private interests, are frequently effected by an award (*z*).

Price and compensation for lands taken for undertakings of a public nature.

Recent statutes have greatly enlarged the class of cases which may appropriately be determined by arbitration. For where any lands are authorized by any act of parliament to be taken for undertakings of a public nature, "The Lands' Clauses Consolidation Act, 1845," provides that in case the promoters of the undertaking and the party interested in the lands cannot agree, the latter may claim to have the amount of compensation due to him determined by arbitrators according to the provisions of the Act (*a*).

Differences as to the price of lands re-sold by the promoters are to be determined in like manner (*b*).

Railways.

These provisions have been extended to the case of railways by the special enactments of "The Railways' Clauses Consolidation Act, 1845," by which compensation for lands taken or used for the construction of any railway, or injuriously affected thereby, may be determined according to the

(*z*) Johnson v. Hodgson, 8 East, 38; R. v Nockolds, 1 A. & E. 245; Doe d. Harris v. Saunder. 5 A. & E. 664; Willoughby v. Willoughby, 4 Q. B. 687; Stat. 2 & 3 W. IV. c. 80, as to Ecclesiastical lands. See Appendix of Statutes; 8 & 9, Vic. c. 118, s. 60, as to Inclosures. See Appendix of Statutes.

(*a*) 8 & 9 Vic. c. 18. See Appendix of Statutes. See also, P. 1, ch. 3, s. 7, d. 7, as to the mode of submission.

(*b*) 8 & 9 Vic. c. 18. s. 130.

mode pointed out in the last named statute (*c*). They have also been made applicable for ascertaining the amount of compensation for lands authorized to be taken or used under the provisions of any act for making Markets and Fairs (*d*), or Harbors, Docks, and Piers (*e*), or Waterworks for supplying towns with water (*f*), or Improvements in Towns (*g*), or Cemeteries (*h*); and also for the lands taken, and the damages caused to any lands by proceedings under the act to facilitate the drainage of lands in England and Wales (*i*).

Markets and Fairs. Harbors, Docks, and Piers. Waterworks. Improvements in towns. Cemeteries. Drainage.

The amount of compensation for injuries to mines, caused by any railway (*k*), and disputes respecting the sufficiency of engines and carriages to be run on any line by a stranger to the company (*l*), are directed by the Railways' Clauses Consolidation Act, to be settled by arbitration.

Injuries to mines by Railways. Fitness of locomotives.

Disputes respecting the keep and expenses of borough prisons in a county gaol, are, by several statutes, to be decided by arbitration. The subject is more fully discussed in the succeeding chapters (*m*).

Expenses of prisoners.

Special enactments afford peculiar advantages for the settling by arbitration differences between masters and workmen in trades or manufactures (*n*). The cases of dispute that may be so settled, are enumerated in stat. 5 Geo. IV. c. 96, s. 2, and include all disputes respecting the trade and manufacture carried on by the parties.

Disputes between masters and workmen.

(*c*) 8 & 9 Vic. c. 20, ss. 6, 44; Clarence Railway Company v. Great North of England Railway, 13 M. & W. 706; See also, P. 1, ch. 3, s. 7, d. 7, as to the mode of submission.

(*d*) 10 & 11 Vic. c. 14, s. 6, The Markets and Fairs Clauses Act, 1847.

(*e*) 10 & 11 Vic. c. 27, s. 6, The Harbours, Docks, and Piers Clauses Act, 1847.

(*f*) 10 & 11 Vic. c. 17, s 6, The Waterworks Clauses Act, 1847.

(*g*) 10 & 11 Vic. c. 34, s. 19, The Towns Improvement Cl ausessee P. 1, ch. 3, s. 7, d. 8. Act, 1847.

(*h*) 10 & 11 Vic. c. 65, s. 6, The Cemeteries Clauses Act, 1847.

(*i*) 10 & 11 Vic. c. 38, ss. 10 & 11.

(*k*) 8 & 9 Vic. c. 20, s. 81.

(*l*) 8 & 9 Vic. c. 20, ss. 115, 117.

(*m*) 5 G. IV. c. 85, s. 2; 5 & 6 W. IV. c. 76, s. 114; 5 & 6 Vic. c. 98, s. 20; 7 & 8 Vic. c. 93. See Appendix of Statutes. See P. 1, ch. 2, s. 3, d. 6; P. 1, ch. 3, s. 7, d. 8

(*n*) 5 G. IV. c. 96; 7 W. IV. & 1 Vic. c. 67, ss. 1, 2, 3; 8 & 9 Vic. c. 77, s. 3; 8 & 9 Vic. c. 128, s. 3. See Appendix of Statutes;

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Disputes relating to savings' banks and friendly societies.

By the Savings' Banks(*o*) and Friendly Societies'(*p*) Acts, disputes connected therewith, may be referred, and so summarily settled. It has been determined, with regard to savings' banks, that the 9 Geo. IV. c. 92, s. 45, is compulsory, and takes away the jurisdiction of the superior courts, and leaves the party no other remedy than that of arbitration (*q*). The 7 & 8 Vic. c. 83, s. 14, seems equally imperative.

What societies are within the act.

The Stat. 4 & 5 W. IV. c. 40, which extends the provisions for friendly societies, after reciting the 10 G. IV. c. 56, enacts, "That it shall and may be lawful for any number of persons, in Great Britain and Ireland, to form themselves into, and establish a society under the provisions of the said recited act, for the mutual relief and maintenance of all and every the members thereof, their wives, children, relations, or nominees, in sickness, infancy, advanced age, widowhood, or any other natural state or contingency whereof the occurrence is susceptible of calculation by way of average, *or for any other purpose which is not illegal.*" These latter words are to be understood with relation only to purposes ejusdem generis, with those specified in the former part of the section. They do not bring within the provision of the act of G. IV., a society which has for its object the loan of money to its members, not being by way of charitable relief; and therefore, though the rules of such society provide for the settlement of disputes by arbitration under the last-mentioned statute, the Court of Queen's Bench will not grant a mandamus to compel justices to enforce an award made by arbitrators, appointed pursuant to the rules, and in accordance with the provision of the same act of parliament (*r*).

Bankrupts' and insolvents' estates.

Matters concerning Bankrupts' and Insolvents' estates,

(*o*) 9 G. IV. c. 92, s. 45; 7 & 8 Vic. c. 83, s. 14. See P. 1, ch. 2, s. 3, d. 2; P. 1, ch. 3, s. 7, d. 8.

(*p*) 10 G. IV. c. 56, s. 27; 4 & 5 W. IV. c. 40, s. 7; 9 & 10 Vic. c. 27, ss. 15, 16, 18, 20, 21, 22. See Appendix of Statutes; see also, P. 1, ch. 2, s. 3, d. 2; P. 1, ch. 3, s. 7, d. 8.

(*q*) Crisp v. Bunbury, 8 Bing. 394.

(*r*) R. v. Shortridge, 1 N. S. C. 56.

may be submitted to the determination of arbitrators, whose award is to be final (*s*).

Joint stock companies' affairs.

By "The Companies' Clauses Consolidation Act, 1845," facilities are given for obtaining an award on questions authorised or directed to be decided by arbitration, by any special act, incorporating a joint stock company for the purpose of carrying on any undertaking (*t*).

Sums borrowed for houses and glebe.

According to the statutes 17 G. III. c. 53, and 55 G. III. c. 147, which empower clergymen to raise money for the purpose of building houses, and providing glebe lands for the use of their benefices, the sum borrowed is made a charge upon the living, and is to be paid by yearly instalments out of the profits; and in case of an avoidance of the living, if a dispute should arise respecting the proportions of the yearly instalment to be charged on the successive incumbents, the question is directed to be referred to arbitration.

Small debts.

The recent statute for the recovery of small debts and demands, empowers the judge, with the consent of parties, to refer to arbitration all claims within the jurisdiction of the county court (*u*).

Civil proceedings at Quarter Sessions. Appeal against order of removal.

III. *Civil proceedings at Quarter Sessions.*]—Civil proceedings at Quarter Sessions may be referred, sub modo, with the consent of the court. On an appeal against an order of removal, where the case, with the consent of parties, was referred to the judge of assize, and the justices agreed to be determined by his opinion, Lord Mansfield and the Court of King's Bench thought it improper to attempt to disturb

(*s*) 6 G. IV, c. 16, s. 88; 1 & 2 W. IV, c. 56, s. 43; 1 & 2 Vic. c. 110, s. 51; 7 & 8 Vic. c. 96, s. 13. See Appendix of Statutes; see also, P. 1, ch. 2, s. 3, d. 1; P. 1, ch. 3, s. 7, d. 2.

(*t*) 8 & 9 Vic. c. 16, ss. 128—134. See Appendix of Statutes; see also, P. 1, ch. 3, s. 7, d. 7.

(*u*) 9 & 10 Vic. c. 95. s. 77. See the appendix of statutes; see P. 1, ch. 3, s. 7, d. 5.

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his decision (*x*). So, where an appeal against a poor-rate was submitted by the justices at sessions to the decision of arbitrators, whose opinion the justices afterward adopted as their own, the same judge expressed his approval of the course they had taken (*y*). It is to be observed, in both these cases the referees only gave their opinion, while the ultimate decision was that of the Quarter Sessions. And such seems to be the proper course; for in an old case, where a complaint by a servant against her master for wages, was referred by the justices of London to the Lord Mayor to determine the matter absolutely, it was held, it could not lawfully be done, although it might have been referred to him to examine and report to the court for their decision (*z*).

Appeal against poor rate.

Arbitrator to report to the court, not to determine finally.

The same principle, that justices at sessions cannot delegate their authority in matters of appeal, was recognised in a late case by Bolland, B., where he says, "Appeals against poor-rates, where the matters in dispute can be more satisfactorily discussed and inquired into before a private tribunal, are frequently, by the consent of the parties litigant, and with the sanction of the justices after such appeals are entered, referred to a competent person or persons, to make his or their report to the court, to give it information and to guide its judgment; but the magistrates only can decide between the parties." In the same case, it is important to observe, the opinion of all the courts was expressed, that the churchwardens and overseers of a parish, and the party rated, could not lawfully, without entering an appeal and without sanction of the justices, by arrangement among themselves, submit the question of the validity of a poor-rate to an arbitration. And where the question of the rate, and also of the costs of preparing to litigate an appeal against it were submitted together, then, although the submission of the question of costs alone would have been good, still as these were only incidental to the principal question of the rate, the submission being void as to the latter, was

Validity of poor-rate not submissible by agreement out of court.

(*x*) R. v. Natland, 3 Burr. S. C. 793.

(*y*) R. v. JJ. Northampton, 2 Bott., pl. 936, S. C. Cald. 30.

(*z*) R. v. Harding, 2 Salk. 477.

void as to the costs also. It was, however, stated by the court in error, that an arrangement might have been made so as to have been binding, and it was intimated by Patteson J., that the agreement would have been legal if the costs had been left to the decision of the arbitrators, and they had been desired to give their opinion as to the validity of the rate (*a*).

IV. *Suits in the Ecclesiastical Courts.*]—Questions within the cognizance of the ecclesiastical courts have sometimes been determined by arbitration. It has been said, that causes matrimonial seem not arbitrable, because marriage ought to be free, and religion disallows the severing those whom the church has joined (*b*).

Suits in ecclesiastical courts for divorce. Terms of separation.

But instances are not wanting, in which matrimonial matters, such as the terms of a separation, have been decided by an award. Thus, where a suit for a separation and divorce was instituted by a wife against her husband, in order to prevent further litigation and disputes touching the terms on which the divorce was to be had, and also to put a final end to the suit, and any question which might arise with respect to the children of the marriage, it was agreed that the terms of the separation, and all matters in contest and dispute between the husband and wife should be referred to arbitration. Although, on a motion for making the submission a rule of the Court of Common Pleas, the objection was taken but overruled, that the matters referred were such as could not be made a rule of court under the statute 9 & 10 W. III. c. 15, yet it was never even suggested that they could not be made the subject of a reference (*c*).

In a later case, ultimately decided by the House of Lords, a wife had instituted a suit for divorce and for alimony in the spiritual courts in Ireland, and also had filed a bill against

(*a*) Thorpe v. Cole, 4 Dowl. 457, S. C. 2, C. M. & R. 367; S. C. in error, 1 M. & W. 531.

(*b*) Bac. Ab. Arb. A.

(*c*) Soilleux v. Herbst, 2 B. & P. 444.

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her husband in the Irish Court of Chancery. All matters in dispute between the parties were referred, and an award was afterwards made. On an appeal by the husband against a decree of the Irish Court of Chancery confirming the award, it was objected that the award was void because the subject matter was not within the jurisdiction of the arbitrator. The House of Lords, however, established the validity of the award, and Lord Eldon observed, "It was objected to the award that it assumed the jurisdiction of the Ecclesiastical Court, and went beyond the submission in awarding a separation. But it did no such thing. It only assumed there must be a separation and provided accordingly" (*d*).

SECTION II.

MATTERS OF A CRIMINAL NATURE.

Some criminal matters and the criminal proceedings founded on them may be submitted to arbitration.

To ascertain what these matters are it is important to consider in what cases the law will allow a criminal charge to be disposed of by private agreement or compromise. For the power to refer must be dependent upon the power to compromise.

Felonies.

The old rule, that matters criminal are not arbitrable because they are to be punished for the public good (*a*), applies universally in cases of felony. Any agreement not to give evidence against a party accused of felony on his trial (*b*), or in any way to compound such a charge, is entirely illegal and void (*c*). An agreement by assignees of a bankrupt to

Examination of a bankrupt.

(*d*) Bateman v. Olivia, Countess of Ross, 1 Dow. 235.

(*a*) Bac. Ab. Arb. A.

(*b*) Mason v. Watkins, 2 Vent. 109; Jones' case, 1 Leon, 203.

(*c*) Drage v. Ibberson, 2 Esp. 643; Johnson v. Ogilby, 3 P. W. 277.

forbear having him examined respecting certain sums which he had received and not accounted for is void (*d*). So also an agreement to drop proceedings on a rule for striking an attorney off the rolls, or calling on him to answer the matters of an affidavit, for the public is interested in the inquiry not being stifled (*e*). In all these instances a reference would be equally objectionable in principle.

Striking an attorney off the roll.

But an agreement to settle a misdemeanor may, in some cases, be perfectly valid in law (*f*); and indictments for various species of misdemeanors are continually, and with the sanction of the courts, referred to an arbitrator for decision.

Misdemeanors.

In cases of ordinary assaults, where the party injured has proceeded by indictment, all the authorities concur that the policy of the law will admit of a compromise or reference (*g*).

Indictment for assault.

Indictments for nuisances of all sorts, such as raising an embankment in rivers (*h*), or carrying on an offensive trade, are, with the approval of the presiding judge, continually referred at the trial (*i*). A bond conditioned to remove a public nuisance obstructing the navigation of a river, and given to a person in consideration of his forbearing to prosecute for the nuisance, has been held good in law (*k*).

For a nuisance.

Where, on an indictment against a parish for non-repair of a high road, the question of the liability to repair was, with the sanction of the judge, left to the decision of an arbitrator, the Court of King's Bench afterwards said that the question had been dealt with at the assizes in a manner which seemed best adapted to meet the justice of the case (*l*).

For non-repair of a road.

(*d*) Nerot v. Wallace, 3 T. R. 17.

(*e*) Kirwan v. Goodman, 9 Dowl. 330; Pool v. Bousfield, 1 Camp. 55.

(*f*) Drage v. Ibberson, 2 Esp. 643; Blanchard v. Lilly, 9 East. 497.

(*g*) Elworthy v. Bird, 2 Sim. & Stu. 372, S. C. not S. P., 2 Bing. 258, 9 Moore, 430; Blake's case, 6 Rep. 43; Black. Com. vol. iv. 363, 15th ed.; R. v. Rant, Kyd on Awards, 64; R. v. Coombs, ib.; Herton v. Benson, Freem. 20

(*h*) Dobson v. Groves, 6 Q. B. 637.

(*i*) R. v. Moate, 3 B. & Ad. 237; R. v. Gore, 8 Dowl. 102.

(*k*) Fallowes v. Taylor, 7 T. R. 475.

(*l*) R. v. Cotesbatch, 2 D. & R. 265; See R. v. Cotton, 3 Camp. 444.

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A rule of very general application as to what criminal matters may be referred, is thus stated by Gibbs, C. J. "Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced" (*m*).

Where remedy by action, criminal matters referable.

Indictment for conspiracy.

A similar rule is laid down in the following case. An indictment for a conspiracy to obstruct persons in carrying on their business as owners of omnibuses had been referred at the suggestion of the judge before whom the trial had commenced. On the case coming before the Court of King's Bench on another point, Patteson, J., in his judgment adopted, as containing a statement of the common law, the following passages from a note to Chitty's Statutes(*n*), "That criminal offences which are personal, such as assault," &c. "and for which an action of damage would lie, may, it is said, be submitted to arbitration;" and "if an indictment has been preferred in any such case, the matter of complaint may still be referred by leave of the court" (*o*).

The limits of compromise in criminal matters are still further defined in a very recent instance.

There, Lord Denman, C. J., in pronouncing the decision of the Court of Queen's Bench, that a compromise, though with the sanction of the court, of an indictment for riot and assault was illegal, embodied in his judgment the following rule: "That the law will permit a compromise of all offences for which the injured party might sue and recover damages in an action. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling the prosecution of it." Then applying the rule to the case before him, Lord Denman added, "In the present instance the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in

Offence of a public nature not referable.

(*m*) Baker v. Townsend, 1 Moore, 120, S. C. 7 Taunt. 422.

(*n*) 1 Chitty's Statutes, 33. Note (b) to stat. 9 & 10 W. III. c. 15.

(*o*) R. v. Bardell, 5 A. & E. 619, S. C. reported as R. v. Shillibeer, 5 Dowl. 238.

the execution of his duty. These are matters of public concern and therefore not legally the subject of a compromise" (*p*).

Indictment for offence against the Toleration Act.

In accordance with the rule which has been above laid down, it had been previously decided that an agreement to drop a prosecution for an offence against the Toleration Act was illegal, as impeding the course of public justice, and Le Blanc, J., had relied on the distinction that the prosecution was for a public misdemeanor, and not for any private injury to the prosecutor (*q*).

To the principle, however, of the above rule, adherence has not in all cases been made, for Lord Kenyon, in distinguishing between compromising a felony and misdemeanor, is reported to have said that a security given for settling a misdemeanor is not contrary to law (*r*). Nor does he make any distinction between the different kinds of misdemeanors, although, in the case to which he alludes for the authority of his opinion, the validity of the compromise of a misdemeanor of a private nature is alone insisted on (*s*). And Mr. Kyd mentions a case in the year following in which the same learned judge acquiesced in the reference to arbitration of some indictments for perjury (*t*); but it does not appear that the question of the legality of such a proceeding was ever raised before his lordship, or the strong language of Wilmot, C. J., reprobating the compromise of a prosecution for perjury as worse than the compromise of some species of felonies (*u*), would probably have been brought to his notice and led him to refuse his sanction to such a reference.

For perjury.

Compromise after conviction.

After conviction a compromise has often been sanctioned by the courts. Thus agreements of compromise made by

(*p*) Keir v. Leeman, 6 Q. B. 308, S.C. Keogh v. Leeman, 8 Jur. 824.

(*q*) Edgcombe v. Rodd, 5 East, 294.

(*r*) Drage v. Ibberson, 2 Esp. 643.

(*s*) Johnson v. Ogilby, 3 P. W. 277.

(*t*) R. v. Lord Falkland, Kyd on Awards, 66.

(*u*) Collins v. Blantern, 2 Wils. 341.

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defendants with the approval of the court, after conviction of the several misdemeanors of ill-treating a parish apprentice (*x*), and of disobeying an order of maintenance (*y*) made by justices have been sustained as legal.

Presentment before commissioners of sewers.

A presentment and proceedings before commissioners of sewers, to procure the removal of some weirs and hatches in a river, have been made the subject matter of a valid award (*z*).

Indictments before Quarter Sessions.

We have seen that in cases of appeal the Quarter Sessions cannot delegate their authority to an arbitrator (*a*), but in criminal matters after conviction a reference is lawful; for where a defendant, after conviction before the Quarter Sessions on an indictment for assault, was called up for judgment, and by the recommendation of the court the prosecutor and defendant entered into an agreement of reference respecting the matters in difference between them, including the assault and the costs of the indictment; on its being contended, on the strength of R. v. Harding (*b*), that the Quarter Session had no power to refer the matter to be determined by another, the Court of Common Pleas sustained the validity of the submission (*c*).

Consent of court to the reference of indictments.

It seems the better opinion, though there is no express decision on the point, that the consent of the court in which an indictment is pending for trial must be obtained in order that the reference should be effectual.

Where cross indictments for riot and assault had been referred by arbitration bonds, the Court of King's Bench expressed a considerable degree of surprise that a criminal prosecution should have been so submitted, and observed that it was usual, indeed in prosecutions of this kind, before

(*x*) Beeley v. Wingfield, 11 East, 46.

(*y*) Kirk v. Strickwood, 4 B. & Ad. 421. See also Goodal v. Lowndes, 8 Justice of the Peace 771. Nov. 23, 1844, Q. B.

(*z*) Doddington v. Bailward, 7 Dowl. 640.

(*a*) See Thorp v. Cole, ante, p. 12.

(*b*) 2 Salk. 477, cited ante, p. 12.

(*c*) Baker v. Townshend, 7 Taunt. 422. S. C. 1 Moore, 120.

a verdict was given, or after verdict of conviction and before sentence, for the parties to talk together by the recommendation of the court, and if they agreed the court set a nominal fine; but the whole was done under the inspection of the court and their sentence formally allowed (*d*).

In the generality of the cases cited with respect to the reference of criminal matters, it will be seen that the sanction of the court was given to the submission or compromise, and from the passage in the note to Chitty's Statutes (*e*), adopted by Patteson, J., in the case of R. v. Bardell (*f*), "That if an indictment has been preferred," &c., "the matter may still be referred *by the leave of the court*," it may probably hereafter be determined that the criminal matters there mentioned, which, before indictment, the parties may submit of themselves, require the leave of the court to give a sanction the reference after an indictment has been preferred.

(*d*) R. v. Rant, Kyd on Awards, 64; R. v. Coombs, ib.
(*e*) 1 Chitty's Statutes, 33. Note (*b*) to 9 & 10 W. III. c. 15.
(*f*) 5 A. &. E. 619, ante p. 16, S. C. 5 Dowl. 238.

CHAPTER II.

WHO MAY REFER MATTERS TO ARBITRATION.

PART I. CH. II. s. 1.

IN this chapter we proceed to examine who are the persons capable of submitting differences to arbitration.

Scope and contents of the second chapter.

The first section treats of those who are interested on their own account in the matters in dispute; the second investigates the powers and liabilities of those who have not necessarily any personal interest but act rather in the capacity of agents or trustees for others; while the third enumerates some classes of persons who derive their authority to refer from acts of Parliament.

SECTION I.

PERSONS INTERESTED IN THE SUBJECT MATTERS.

Persons capable of contracting.

1. *Parties capable of disposing of their rights.*]—Every one capable of making a disposition or release of his right can make a submission to an award (*a*). But those who are attainted or outlawed cannot submit, for they have no property, and cannot by law controvert anything (*b*).

Persons that cannot contract cannot submit to arbitration. Pursuant to this leading principle it is broadly laid down in

(*a*) Com. Dig. Arb. D. 2. (*b*) Bac. Ab. Arb. C.

the older authorities that femes covert, persons compelled by threats and imprisonment, and persons professed in religion cannot submit (*c*).

Feme covert. Husband civiliter mortuus.

II. *Femes Covert.*]—Some exceptions exist to this proposition, as far as regards femes covert. For where the husband, by exile, banishment, abjuration, or profession of religion, was civiliter mortuus, the wife was always held capable of making contracts, and acting in every respect as a feme sole, and consequently might be a party to a reference (*d*).

Transported

The wife of a felon, transported for life, would be equally competent (*e*). So during the term, the wife of one transported for seven years only (*f*).

Alien enemy.

So likewise the wife of an alien enemy, but not of an alien ami; for the later decisions seem to show, that it is only where the absence of the husband from the country is involuntary that the law invests the wife with a separate character (*g*).

Sole trader in London.

Sometimes by local custom, as in the city of London, a married woman is authorized to carry on business as a sole trader (*h*). It is apprehended she might refer disputes respecting her business to arbitration.

Separate estate in equity.

Where a married woman has a separate estate settled to her separate use, she is considered in equity (*i*), though not in law (*k*), competent to act concerning it, in all respects

(*c*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2.

(*d*) Co. Litt. 1, Inst. 133. a.; Countess of Portland v. Prodgers, 2 Vern. 104.

(*e*) Newsome v. Bowyer. 3 P. W. 37.

(*f*) Sparrow v. Carruthers, cited in Marsh v. Hutchinson, 2 B. & P. 226; also in Lean v. Schutz, W. Bl. 1197; Carrol v. Blencow, 4 Esp. 27.

(*g*) Marsh v. Hutchinson, 2 B. & P. 226; Barden v. Keverberg, 2 M. & W. 61; Deerly v. Duchess of Mazarine, 1 Salk. 116, S. C. 1 Lord Raym. 147. See also, Walford v. Duchesse de Pienne, 2 Esp. 553; Franks v. Duchesse de Pienne, 2 Esp. 587; Kay v. Duchesse de Pienne, 3 Camp. 122; De Gaillon v. L'Aigle, 1 B. & P. 357.

(*h*) Beard v. Webb, 2 B. & P. 93.

(*i*) Peacock v. Monk, 2 Ves. Sr. 190; Allen v. Papworth, 1 Ves. Sr. 163; Pybus v. Smith, 1 Ves. 189; Dubois v. Hole, 2 Vern. 613; Jones v. Harris, 9 Ves. 486: Hulme v. Tenant, 1 Bro. C. C. 16; Heatley v. Thomas, 15 Ves. 596; Grigby v. Cox, 1 Ves. Sr. 517.

(*k*) Marshall v. Rutton, 8 T. R. 545, overruling Corbett v. Poelnitz, 1 T. R. 5; Beard v. Webb, 2 B. & P. 93.

as a single woman. But where she is interested in real estates, which are not settled to her separate use, she is not so treated, even in equity. In one instance the Court of Chancery refused to permit a reference to arbitration, one of the parties being stated to be a feme covert, interested in real estate, or even a reference to the master to inquire whether it would be for her benefit as in the case of an infant (*l*). A consent of a married woman to be bound by an award already made, cannot bind her as it often will a feme sole (*m*).

Real estate not settled to her separate use.

Where a married woman has been a party to a submission, and an award has been made, a court of law will refuse to set aside the award, on the ground that she is not bound by it, at the prayer of a party to the submission, who, from the first, was cognizant of her coverture, for he never should have consented to refer the matters, and allow her to become a party, if he intended to make this objection (*n*).

Agreeing to a reference with a married woman knowing her coverture.

Whether a single woman, party to a reference, is freed from liability to an attachment for disobedience to an award by a subsequent marriage, is considered subsequently (*o*).

Effect of marriage on liability of single woman.

III. *Husband and Wife.*]—A submission between a wife and her husband has been held valid.

Submission between husband and wife, suit for divorce.

The Countess of Ross had instituted a suit for a divorce, in the Spiritual Courts in Ireland, and also by her next friend, filed a bill against her husband in the Irish Court of Chancery; all matters in difference between the parties were referred, and the award was confirmed in Chancery, and also on appeal in the House of Lords, where Lord Redesdale said, "It had been objected to the award, that the Countess could not agree to the submission so as to bind herself, unless she had been separated from her husband, and her next friend was not made a party to it. But it appeared to him

(*l*) Davis v. Page, 9 Ves. 350.

(*m*) Evans v. Cogan, 2 P. W. 450.

(*n*) In re Warner. 2 D. & L. 148.

(*o*) Anon. 1 Cromp. 265. See P. 111, ch. 6, s. 1, d. 3.

that there was nothing in the objection, as the award was founded on an agreement on both sides, and he had filed a cross bill against her, which she had answered, so that under the circumstances of this case she was to be regarded quite as a feme sole, and there was no occasion to make the next friend a party, as there was nothing for him to consent to. He must act entirely as the wife directed; it was not like the case of an infant suing by a next friend" (*p*).

Between husband and wife's trustee, suit for divorce.

A submission by a husband and a trustee of the wife, of all matters in difference between the husband and wife, including a suit for a divorce instituted by the latter, was permitted to be made a rule of the Court of Common Pleas (*q*).

Husband's right to refer wife's chattels.

A husband may submit differences respecting the chattels he has in right of his wife to an award, for he may dispose of them (*r*). So he may refer his claims for a debt upon a bond made to his wife before coverture, and the award will bind the wife after his death (*s*); for an award in the husband's favor respecting chattels, real or personal, claimed in right of the wife, amounts to a sort of judgment, and operates as a reduction of them into possession (*t*). If the husband only submit, it is sufficient to bring before the arbitrator a question relating to a debt due from the wife as executrix or administratrix, for the husband is chargeable with it by the marriage (*u*). So a submission is good by a husband only of a lease for years, which his wife has as executrix; and the award will bind her after his death (*x*).

Wife's chattels as executrix.

Husband's right to refer wife's real estate.

When a husband has contracted to sell his wife's interest in real estates, at a price to be fixed by arbitration, equity has, in some instances, decreed him to procure her to join in

(*p*) Bateman v. Olivia, Countess of Ross, 1 Dow. 235.

(*q*) Soilleux v. Herbst, 2 B. & P. 444.

(*r*) Bac. Ab. Arb. C.; Smith v. Ward, Styles 351.

(*s*) Com. Dig. Arb., D. 2; March. 77.

(*t*) Williams, Exors., 538, 687; 1 Rolle Ab. Arb. 245, D. See also, 1 Roper, on Husband & Wife, 185, 219, 2d Ed.; Hunter v. Rice, 15 East, 100; Oglander v. Baston, 1 Vern. 396.

(*u*) Com. Dig. Arb., D. 2; 1 Rolle Ab. 246, 2.

(*x*) Com. Dig. Arb., D. 2; Bac. Ab. Arb., C.; Lumley v. Hutton, Rolle Rep. 269, Cro. Jac. 447.

conveying the lands, on the principle that he must be presumed to have gained her consent before the bargain was made. Lord Eldon has, however, expressed doubts of the propriety of that course, as the policy of the law is, that a married woman is not to part with her property but by her own free will (*y*). Whether he is liable to an attachment for refusing to pay a sum which an award had ordered his wife to pay before her marriage, is doubtful (*z*).

Liability to attachment for wife's default.

Infant's submission voidable, not void.

IV. *Infants.*]—If an infant submit to arbitration, he may execute or avoid it at his election, as he may most of his other contracts (*a*). In an old case, an infant's submission was said to be void (*b*), and not voidable only as it is now considered. If a man of full age is jointly bound with an infant to stand to an award, such obligation will bind the former (*c*). A father or guardian may bind himself that an infant son or ward shall perform an award (*d*). But if the award directs, that on payment by defendant of a sum of money, the infant shall execute a release, though the submission to which he is a party may be good, as it may be for his benefit, yet the award will be void, as an infant cannot execute a binding release; and the father will be unable to enforce the arbitration bond against the defendant (*e*). An infant may be directed by the award to pay costs (*f*).

Persons of full age bound for infants.

Whether equity will enforce award against infant.

Equity, it has been said, will not decree an award to bind an infant (*g*), but the rule is not without an exception (*h*).

(*y*) Emery v. Wase, 5 Ves. 846, 8 Ves. 504 a.; Berry v. Wade, Cas. Temp Finch, 180.

(*z*) Anon. 1 Cromp. 265, 3d Ed. See P. 111, ch. 6, s. 1, d. 3.

(*a*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2; Godfrey v. Wade, 6 Moore, 488; Harvey v. Ashley, 3 Atk. 607; Holt v. Ward, Fitzgibbon, 175, 275.

(*b*) Rudston v. Yates, March 111, 141, 1 Rolle, Ab. Arb. A. 268.

(*c*) Com. Dig. Arb. D. 2; Bean v. Newbury, 1 Lev. 139.

(*d*) Gill v. Russell, Freem. 62, 139; Roberts v. Newbold, Comb. 318; Bowyer v. Blorksidge, 3 Lev. 17.

(*e*) Knight v. Stone, W. Jones Rep. 164, S. C. Stone v. Knight, Latch. 207, Noy, 93.

(*f*) Proudfoot v. Poile, 3 D. & L. 524.

(*g*) Cavendish v. ——, Eq. Cas. Ab. 49; S. C. 1 Cas. in Chancery, 279; Evans v. Cogan, 2 P. W. 450.

(*h*) Bishop of Bath and Wells v. Hippesley, cited in Harvey v. Ash-

When an infant is a party to a suit in Chancery, the court will refer it to the master to ascertain whether it would be for the infant's benefit that the suit should be submitted to arbitration, and will make an order in accordance with the master's report (*i*).

Reference to master whether arbitration for infant's benefit.

If the object which the parties had in view when they agreed to refer, fails, and cannot be obtained by a reference, by reason that certain infants ought to have been made parties, who could not be made so by law, the whole submission is void (*k*). This doctrine is the foundation of the following decision:—The attorneys engaged in a suit in which there were infant plaintiffs suing by their next friends, referred it to arbitration, but the Court of King's Bench held that the attorneys had no sufficient authority to refer on behalf of the infant plaintiffs, or to bind the next friends of the infants for the performance of the award by the infants when they should come to maturity, that as the submission failed in one important point, it consequently was not good for the rest, and that the award was void for the want of mutuality (*l*). There was a clause in the submission, empowering the arbitrator to make one or more awards, but that was not noticed in the argument. In a later case, a similar clause was much relied on to show that the object of the parties was not, that the arbitrator must decide every point, in order that his decision on one should be binding. That case bears also materially on the point of mutuality more immediately under consideration. There a cause, and all matters in difference in law and equity, were referred. Two equity suits were pending, in which the parties to the action were concerned, and also certain infants were interested. It was urged that the submission was not mutual, because infants were parties to the suits, and were not bound nor could be. In delivering judgment in favor of the

Mutuality of Infant's submission.

Parties submitting with full knowledge of the infancy.

ley, 3 Atk. 607. See P. 111, ch. 4, s. 1, d. 2.

(*i*) Davis v. Page, 9 Ves. 350. See also Dowse v. Coxe, 10 Moore, 286.

(*k*) Thorp v. Cole, 4 Dowl. 457, S. C. 2 C. M. & R. 367.

(*l*) Biddell v. Dowse, 6 B. & C. 255, in error from C. P. S. C. 9, D. & R. 404. See case below, reported Dowse v. Coxe, 10 Moore, 272, S. C. 3 Bing. 20.

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award, Parke B., in respect of that objection, observed, "If it be argued that the agreement, on behalf of all the parties to all the suits to give the arbitrator power to decide, was a part of the consideration, and that the want of a binding consent of the infant parties' caused a failure of the consideration, the answer is, that all the parties well knew that there were infant parties, and as they must be presumed to know the law, they knew that they were not bound by the attorney's consent on their behalf, and therefore they had all the consideration which they had stipulated for; and the consent of those parties who could and did consent, was a sufficient consideration, in point of law, for their promise (*m*)."

In another case, where the objection was that some of the parties whose interests were referred, were not of full age; and that two persons, one of them a defendant in the replevin suit referred, the other a lessor of the plaintiff in one of the ejectments referred, were not parties to the submission, Coleridge, J., said, "the party entering into the reference, cannot entitle himself to this relief on these grounds; he must be taken to have known who were the parties to the actions, to which he himself is a party, and to the submission which he enters into, and it would be most unjust to allow him to take the chance of an award in his favor; and that failing, to claim to set aside the whole proceedings for a defect in the submission, of which he had full cognizance when he entered into it"(*n*).

In a late case it was held to be no objection to an award, that some infant legatees under a will, were not parties to or bound by a reference, which related to their trust estate (*o*).

Partner not bind co-partner.

v. *Partners and parties with joint interests.*]—If a man submit for himself and his partner all matters in difference be-

(*m*) Wrightson v. Bywater, 3 M. & W. 199.

(*n*) Jones v. Powell, 6 Dowl. 483.

(*o*) Warner In re, 2 D. & L. 148.

tween the partnership and another, the partner submitting shall be bound to perform the award; but the other shall not, because he is a stranger to the award. If, however, the latter refuse, it is a breach of the submission by the partner who agreed to the reference (*p*).

The same rule prevails in the case of a general partnership, as well as in the case of a partnership in a particular transaction. There is no implied authority in either case for some of the partners to bind the others by a submission to arbitration made without their knowledge or assent; for it forms no part of the transaction, in which they are jointly engaged, and joint contractors can only be made responsible for transactions arising in the way of their business or employment. It is not, however, necessary that that assent must be given in any particular form of words, nor is it required to be made under the hand of the co-partner. All that is necessary is, that there should be some evidence of an actual authority conferred. Such a power does not arise out of the relation of partnership, and is not, therefore, to be inferred from such relation (*q*)."

All must execute or none bound.

Even the individual partners who are parties to the reference, are sometimes not bound by the award. Thus where, by a deed of covenant purporting to have been made between several persons who were partners, the partnership accounts, and all matters in difference between the parties or any two of them were referred, and two only of the partners executed the deed, an award deciding on a separate claim between the two who executed was not held binding upon them, as the consideration to each to execute his own submission was the submission of all the others, and until all had executed the deed, the arbitrators had no authority (*r*).

(*p*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2; Strangford v. Green, 2 Mod. 228.

(*q*) Stead v. Salt, 10 Moore 389, S. C. 3 Bing. 101; Adams v. Bankhart, 1 C. M. & R. 681; Burnell v. Minot, 4 Moore, 340; Wood v. Thompson, Rol. Ab. Arb. F. 11, p. 249. See Boyd v. Emmerson, 2 A. & E. 184.

(*r*) Antram v. Chace, 15 East, 209; Adams v. Bankart, 1 C. M. & R. 681.

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Party submitting for others as well as himself.

In general, a man is bound by an award which he submits to for another (*s*). Thus, if the parson on the one hand, and some of the parishioners on the other hand, in behalf of themselves and the rest of the inhabitants of the parish, but without the authority of the rest submit to arbitration by bond, the parishioners submitting shall alone be answerable for a breach of the award by any of the other parishioners (*t*).

Rector refer right to tithe during his incumbency.

VI. *Corporations, sole and aggregate.*]—It is stated in the Year Books that an award made on the submission of a preceding prior shall bind his successor (*u*), but it is clear that a rector who refers a question respecting the amount of tithes cannot so provide that the award shall be conclusive beyond his own incumbency of the living (*x*).

As to certain references by statute by rectors concerning their houses or glebe lands, and by bishops, deans, and chapters, and others, respecting the boundaries of their estates, see the following section.

Churchwardens and overseers.

Churchwardens and overseers may refer to an arbitrator whether they or the party rated are to pay the costs of preparing to litigate an appeal against a poor-rate, though they may not refer the validity of the rate itself (*y*).

Corporations aggregate.

Corporations aggregate may be parties to a reference. In a recent case it was discussed whether the attorney of a corporation required a special authority under the corporate seal to empower him to refer a cause; at all events a subsequent ratification of his acts under the corporate seal is suffi-

(*s*) Bac. Ab. Arb. C.; Alsop v. Senior, 2 Keb. 707, 718; Shelf v. Bailey, Com. Rep. 183; Bacon v. Dubarry, 1 Ld. Raym. 246, S. C. Salk. 70, Skin. 679, Carth. 412, Comb. 439, 12 Mod. 129.

(*t*) Bac. Ab. Arb. C.; Mudy v. Osam, Litt. 30.

(*u*) Rolle, Ab. Arb. 268, A. 3, 2 H. 4, 4, b.

(*x*) Attorney General v. Chomley, 2 Eden, C. C. 304, Amb. 510; Prosser v. Goringe, 3 Taunt. 425.

(*y*) Thorp v. Cole, 4 Dowl. 457; S. C. 2 C. M. & R. 367, S. C. in error, 1 M. & W. 531.

cient(z). The reference must be an act of the corporate body. A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them (a). But where the body corporate properly enter into a submission, the award is binding upon them.

The Court of Chancery has on several occasions enforced an award against an eleemosynary corporation (b).

Attorney General's consent in case of charities.

It may here be proper to remark, that in suits in equity respecting charity property, the court will not permit a reference, however advisable such a course may seem, unless the Attorney-general gives his consent (c).

Party joined on the reference of a cause.

VII. *Parties interested, added.*]—It often happens, when a cause is referred, that a third party is made a party to the submission, and under some forms of submission the arbitrator has been held warranted in treating him as a party to the cause itself (d). Even when not inserted as a party in the order of reference, his assent to the proceedings will in many cases preclude him from disputing his obligation to abide by the award (e).

Party added afterwards.

Where a submission has in the first instance been made between two, a third party may be added afterwards, and the reference may proceed as if all three had been parties to the original order of reference (f).

Party by subsequent consent.

Subsequent consent to the award by a party interested in

(z) Mayor of Ludlow v. Charlton, E. T. 1845, Ex.; Attorney General v. Clements, 1 Turn. & R. 58.

(a) Bac. Ab. Arb. C., 21 Ed. IV. 13.

(b) Attorney General v. Clements, 1 Turn. & R. 58; see P. 111, ch. 4, s. 3, d. 1.

(c) Attorney General v. Fea, 4 Madd. 274; Attorney General v. Hewitt, 9 Ves. 232; Prior v. Hembrow, 8 M. & W. 873.

(d) Hawkins v. Benton, 2 D. & L. 465, S. C. 15 L. J. N. S. 139, Q. B.; Rogers v. Stanton, 7 Taunt. 575 n; Morgan v. Miller, 6 Bing. N. C. 168; Prosser v. Goringe, 3 Taunt. 425; Nickalls v. Warren, 9 Jur. 10.

(e) Gunton v. Nurse, 5 Moore, 259.

(f) Winter v. Munton, 2 Moore, 723.

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the subject matter of it, will in equity often have the effect of binding his interests (*g*).

Party by acquiescence.

Even acquiescence may render a person concluded by the terms of an award. Thus, where the landlords of two adjoining estates let on lease referred to a surveyor to determine and stake out a disputed boundary between their respective properties, the tenant of one estate who by his conduct assented to the surveyor's staking out the line, was held bound by the decision of the surveyor as if he had been an original party to the submission (*h*).

Party by laches.

So far has this principle been carried that a third party having a claim on a subject of reference between *A.* and *B.*, and not bringing forward his claim, was held in equity bound by the award (*i*).

SECTION II.

PERSONS NOT INTERESTED IN THE SUBJECT MATTERS.

1. *Authorized agent.*]—The parties to a submission of whom we have hitherto treated are those who are personally bound by the award, and whose immediate interests form the subject of reference.

We now come to consider a class of parties, who have no interest of their own in the matter in dispute, but who nevertheless sometimes incur a personal liability.

If a man authorize another on his behalf to refer a dispute between himself and a third party an award consequent on

(*g*) Evans v. Cogan, 2 P. W. 450.

(*h*) Taylor v. Parry, 1 M. & G. 604.

(*i*) Govett v. Richmond, 7 Sim. 1; see P. 111, c. 4, s. 1, d. 2.

such submission is binding on the principal alone, and it is no objection that the agent had no interest in the subject of the dispute. But if the agent expressly bind himself for the performance of the principal, not only the principal who authorized him, but the agent himself is bound by the award (*a*).

Submission to arbitration by agent authorized to refer.

A party to whom debts had been equitably assigned, and who was authorized under a power of attorney to receive and compound for the same, having submitted to arbitration the matters in difference between his principals and one of their debtors, was held entitled to maintain an action in his own name for the sum awarded in his favour (*b*).

What a sufficient authority.

It often becomes a question whether a person who is agent for some purposes is so for the purpose of binding his principal by a reference. A person who underwrites, and settles losses for another, has an implicit authority from him to refer to arbitration a dispute about a loss (*c*).

When a member of a partnership firm gave his son a power of attorney to act upon his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, it was held that this gave the son power to submit the accounts to arbitration (*d*). Consignees of goods were by agreement, after deducting their advances, charges, and commissions, to pay over the balance. When the goods arrived the captain of the ship, the agent of the party entitled to the balance, who was then a bankrupt, wrongfully refused to deliver them. No assignees had been appointed. The consignees were held authorised to sue the captain and also to submit the action to arbitration, and to deduct the costs of both action and reference from the balance to be paid over (*e*).

(*a*) Bac. Ab. Arb. C.; Dyer, 216 b. Cayhill v. Fitzgerald, 1 Wils. 28, 58. Com. Dig. Arb. D. 2.

(*b*) Banfill v. Leigh, 8 T. R. 571.

(*c*) Goodson v. Brooke, 4 Camp. 163.

(*d*) Henley v. Soper, 8 B. & C. 16; S. C. 2 M. & R. 155.

(*e*) Curtis v. Barclay, 5 B. & C. 141.

II. *Attorneys and Solicitors.*]—Attorneys and solicitors are agents who are clothed with peculiar powers of affecting their clients' interests.

Power of an attorney to bind his client by a reference.

When a person has given an attorney any general authority to act for him in legal proceedings, the courts have always been inclined to hold him bound by his attorney's acts, and yield with reluctance to any complaint that the attorney has acted beyond or contrary to the authority given him in consenting to a reference (*f*).

On one occasion, Best, C. J., seems to have assumed as clear, that an attorney in a cause has power to refer the cause, whatever be his authority as to matters out of it, and that attorneys for the parties generally have power to refer all matters in difference (*g*). In another instance, where it was necessary to prove at Nisi Prius that all the members of a firm had assented to a parol submission, the arbitrator stated in the witness-box that he had been requested by one partner only to undertake the arbitration, that the defendants had never personally attended, but were represented at the reference by their attorney, *A. B.* Taunton, J., in summing up to the jury, said, that *A. B.* having acted as attorney for the defendants, they must be taken to be bound by his acts (*h*).

Even where a defendant swore that she had expressly desired her attorney not to consent to a reference, and that no step had been taken in it except the appointment of a meeting, the court refused the application to set aside the Nisi Prius order of reference, and Mansfield, C. J., said, "Here is an express agreement to refer, properly entered into by counsel and attorney; it is now said they had no authority to enter into that agreement; if so the defendant's remedy is by action against her attorney (*i*)."

In a more recent case against a land steward defended by

(*f*) Latuch v. Pasherante, 1 Salk, 86; Buckle v. Roach, 1 Chitt. 193: Bodington v. Harris, 1 Bing. 187; Jamieson v. Binns, In Re, 4 A. & E. 945.; Paull v. Paul, 2 C. & M. 235.

(*g*) Dowse v. Coxe, 3 Bing. 20.

(*h*) Adams v. Bankart, 1 C. M. & R. 681.

(*i*) Filmer v. Delber, 3 Taunt. 486.

the landlord, the attorney had agreed to an order of Nisi Prius compromising that action, and also other actions between the plaintiff and the landlord; a motion was made to set aside the order on the ground that the attorney had no authority to bind the landlord by such an arrangement, and it was argued that employing an attorney in a cause gives him no authority to refer all matters in dispute between the parties; but the court said it was constantly done, and refused to interfere in a summary way (*k*).

The attorney's consent to an enlargement of time binds the client (*l*).

A judge's order referring a cause may be made a rule of court without any consent on the part of the client. If the attorney consents for him it is enough (*m*).

Town agent of attorney.

The acts of the attorney's town agent are as binding on the client as the acts of the attorney himself (*n*).

Confidential clerk.

But a confidential clerk of an attorney is not competent to bind his principal or the client by consenting to the appointment of an umpire by lot (*o*).

Solicitor.

A distinction was formerly taken, which, however, may well be doubted now between the authority of a solicitor and attorney. It was said that the assent of a solicitor to a reference by an order of a court of equity was not obligatory on the client without his actual concurrence, though in the same case it was admitted that such a reference by rule of Nisi Prius would bind him (*p*).

Attorney personally bound.

Like other agents, attorneys bind themselves by a submission if they expressly contract to be bound (*q*), and when they submit without authority they alone are bound (*r*).

(*k*) Thomas v. Hewes, 2 C. & M. 519.

(*l*) R. v. Hill, 7 Price, 636.

(*m*) Paull v. Paull, 2 Dowl. 340.

(*n*) Griffith v. Williams, 1 T. R. 710.

(*o*) Greenwood v. Titterington, In re, 9 A. & E. 699.

(*p*) Bac. Ab. Arb. C.; Colwel v. Child, Cas. in, Ch. 86, 1 Ch. Rep. 104. See Furnival v. Bogle, 4 Russ. 142.

(*q*) Com. Dig. Arb. D. 2; Cayhill v. Fitzgerald, 1 Wils. 28, 58; Iveson v. Conington, 1 B. & C. 160.

(*r*) Bac. Ab. Arb. C. Bacon v. Dubarry, 1 Salk. 70; S. C. 1 Lord Raym. 246; Comb. 439; Carth. 412; but see Anon. 6, Mod. 16, and Wade v. Stanley, 1 Jac. & W. 674.

Attorney to a corporation, authority under seal.

It seems not yet decided whether, when a corporation is a party to an action, the attorney can bind them by a reference without a special authority under seal. A cause in which a corporation was plaintiff was referred. After some steps had been taken in the reference the defendant discovered that the attorney of the corporation had no retainer under seal. He consequently applied to have the order of reference set aside unless the corporation would ratify under seal the proceedings of their attorney. This they in fact did before the argument; and the court refused to determine how far a retainer under seal was necessary for the ordinary purposes of a cause or a special authority for a valid submission, on a mere question of costs, and Pollock, C. B., distinguished the case of *Arnold* v. *Mayor of Poole* (*s*), by saying that that case showed a retainer under seal was necessary to enable the attorney to recover, but not that it was necessary in order that the corporation should be bound (*t*).

Attorney in an appeal before Quarter Sessions.

The attorneys of the parties to an appeal against a poor-rate at the Quarter Sessions have sufficient authority to refer the question to arbitration (*u*).

Suit in equity: infant plaintiffs.

When infants sue by their next friends in Chancery, the attorneys in the suit have no authority to bind the infants by a reference, or the next friends of the infants, for the due performance of the award by the infants (*x*).

Power of counsel to refer to arbitration.

III. *Counsel.*]—A reference by the consent of a counsel in a cause will, it is apprehended, in general be binding on the party he represents.

A counsel appeared to consent to a compromise of a suit on behalf of one of the parties. Some doubt being suggested whether the counsel was authorized by the party to the suit, the instructions not being given by the solicitor she had formerly employed, Lord Chancellor Eldon said, "It is for the counsel to consider whether he is authorized to

(*s*) 4 M. & G. 860.

(*t*) Mayor of Ludlow v. Charlton, E. T. 1845, Ex.

(*u*) R. v. JJ. Northampton, 2 Bott. pl. 936; S. C. Cald. 30.

(*x*) Biddell v. Dowse, 6 B. & C. 255.

give his consent for the widow. If he does, I must act upon it, and she will be bound by it (*y*).

Counsel with full information of the facts.

That decision of Lord Eldon's was relied upon in the following case:—A counsel in a suit in equity, in the absence of his solicitor and of the client from the court, consented to an order being drawn up on certain terms proposed by the other side. When the client was informed of it he strongly objected to the terms, and moved to have the order rescinded. The case was several times brought before Lord Lyndhurst, C., who stated his opinion, that a party was bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprized of all those facts, of which the knowledge was essential to the proper exercise of their discretion, but that he would be relieved from an order made by such consent if they gave that consent in ignorance of material circumstances. He also intimated, that if the solicitor had been in court, and with a full knowledge of all the facts of the case had assented to the arrangement, it would have bound his client; and that if the solicitor, when he heard of the order, had dissented from it, it was his duty to have given immediate notice of his objection; that by not doing so he would be taken to have adopted it, and his client would be bound. Affidavits, however, were admitted to show that the counsel had not all the proper facts before them, and that there had been no laches in objecting on the part of the solicitor, and consequently the order was rescinded (*z*).

The principle that parties are bound by the consent of their counsel has been recognized in a late case, where a petition to retore a petition dismissed by consent upon the ground that no authority had been given to counsel to consent, was dismissed with costs (*a*).

Power of counsel in the Scotch courts.

Counsel seem to have equal authority in Scotland. On the trial of two cross actions in the Scotch courts, the coun-

(*y*) Mole v. Smith, 1 Jac. & W. 673. See R. v. Corporation of Helston, 10 Mod. 202. Gresley on Evidence, 458, 2d ed. College v. Horn, 3 Bing. 119; Elworthy v. Bird, Taml. 43.

(*z*) Furnival v. Bogle, 4 Russ. 142.

(*a*) Hobler, In re, 8 Beav. 101.

sel had, at the suggestion of the judge, agreed to refer them, and had subscribed a minute of judicial reference referring them to A. B., or failing him, to any arbitrator to be named by the Lord President. A party sole plaintiff in one, and sole defendant in the other action, in the course of the day protested against the reference, and moved the court to discharge it, alleging that he was not aware of the terms of it, and was taken by surprise, adding, (what was the fact,) that A. B. declined the reference. But the Lord President and lords of first division, before whom the matter was heard, admitted the reference, and appointed another arbitrator in the place of A. B.

In the course of the same cause, however, an order made by the consent of counsel only was rescinded. For after an award was made the matter was brought by appeal before the House of Lords. On the hearing of the appeals, they were at the suggestion of the lords present withdrawn upon terms consented to by the counsel of the parties, and embodied in an order of the House. That order was rescinded upon petition of the appellant's agent, stating that he had not considered the terms of the compromise when the counsel consented to it, and the appeals were reheard (*b*).

Submission by an executor and administrator.

IV. *Executors and administrators.*]—An executor or administrator may, as such, submit to arbitration matters relating to the estate of the deceased, but if the arbitrator does not award as much as he would be entitled to at law, it will be a devastavit for the residue (*c*).

Devastavit.

Entering into a submission relating to matters in difference between the deceased and another without the executor's protesting against the reference being taken as an admission of assets will amount to such an admission, and if the award directs him to pay a sum, he will be bound per-

(*b*) Baillie v. Edinburgh Oil Gas Light Company, 3 C. & F. 639.

(*c*) Bac. Ab. Arb. C.; Com. Dig. Admin. I. 1. Assets. C.; Anon. 3 Leon. 53; Went. Off. Ex. 61; Vin. Ab. Executors, G. a. 3. See Yard v. Eland, 1 Lord Raym. 368.

When executor personally liable.

sonally, if the assets are insufficient, and will not be allowed to plead plene administravit to an action on the arbitration bond (*d*); for if he does not protest in the first instance that he has no assets, he will not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbitration to no purpose (*e*). And an arbitration should be placed on the same footing as an action in which, if an executor omit to plead that he is without assets, he cannot afterwards set up that ground of defence (*f*).

Reference: admission of assets.

It is often, therefore, said in terms that a submission by an executor or administrator is in itself an admission of assets (*g*). But perhaps, more strictly speaking, the submission does not so much amount to an absolute admission of assets as to a submission of the question whether there are assets or no (*h*). Thus, where the arbitrator awarded a sum to be due from the intestate's estate, but without saying by whom it was to be paid, the administrator was not held personally liable to the payment; and Lord Kenyon distinguished the case of *Barry* v. *Rush*, above quoted, by saying, "There the defendant submitted in broad terms to pay whatever should be awarded, and the arbitrator did award that he should pay a certain sum, whereas here the arbitrator has only ascertained the amount of the debt due from the intestate, but has not directed the defendant to pay it. It is impossible, then, to say that the arbitrator decided that the defendant had assets, and a submission to arbitration by an administrator is not of itself an admission of assets" (*i*). That case was followed by another in which the award directed the defendant, an administratrix, to pay the sum found due, and the same judge took the distinction, saying, "Here the arbitrator has awarded that the defendant, the

No direction to pay in the award.

Direction to pay in the award.

(*d*) Robson v. —, 2 Rose, 50; Barry v. Rush, 1 T. R. 691. See P. II, ch. 8, s. 1, d. 2. How arbitrator should direct executor to pay; P. III., ch. 6, s. 1, d. 3. Attachment against executor.

(*e*) Riddell v. Sutton, 5 Bing. 200.

(*f*) Riddell v. Sutton, 5 Bing. 200.

(*g*) Barry v. Rush, 1 T. R. 691.

(*h*) Worthington v. Barlow, 7 T. R. 453.

(*i*) Pearson v. Henry, 5 T. R. 6.

administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix was a reference not only of the cause of action but also of the question whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant, therefore, is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor (*k*).

Direction to pay out of assets.

In a third case, where the arbitrator awarded a balance against the testator, and directed the executor to pay the amount out of the assets, Abbott, C. J., was of opinion that the latter part of the award did not conclude the question of assets, but left it open (*l*).

The practice in equity is in accordance with these decisions, and shows the effect of such a direction.

Direction to pay out of assets quando.

An award directed an executor to pay a certain sum "out of the assets which might be in his hands, or which might be coming to him." He was also directed to pay the costs. The other party, relying on the fact that the submission was general, moved in the Court of Chancery for an attachment against the executor for non-payment of the sum and costs. This motion, on an affidavit of the executor that he had no assets, was dismissed with costs by the Vice-Chancellor. It was subsequently renewed before the Lord Chancellor, (Lyndhurst,) but on the additional affidavit that since the previous application assets exceeding the sum awarded had come to the executor's hands. And on this ground the Lord Chancellor, expressing his approval of the previous decision of the Vice-Chancellor, directed an attachment to issue (*m*).

Liability of executor to costs.

A personal representative is sometimes bound to pay costs. Thus, where an action by an administrator, with a count in the declaration containing a promise to himself as administrator was referred, the costs to abide the event, and

(*k*) Worthington v. Barlow, 7 T. R. 453.

(*l*) Love v. Honeybourne, 4 D. & R. 814.

(*m*) Joseph v. Webster, In re, 1 Russ. & M. 496.

the arbitrator awarded that the plaintiff had no cause of action, it was held that the plaintiff was personally liable to costs (*n*).

Submission by trustees.

v. *Trustees.*]—It is said that trustees, by submitting matters to arbitration, do not make themselves personally liable (*o*). But it is apprehended that must entirely depend upon the terms of the submission. In order to be safe, it is recommended that they should in express terms take care to exclude the construction of any personal liability, for there seems no reason why they should stand in any more favourable position than executors.

Liability.

Submission by a committee of lunatic.

vi. *Committee of a lunatic.*]—A committee of a lunatic may, with permission of the Court of Chancery, but not without, bind the lunatic by submitting his interests to arbitration (*p*).

On the application of the committee, the court will on a fitting case refer it to the master to inquire whether it is proper and for the benefit of the lunatic's estate to refer the demands against his estate to arbitration, and upon what terms and conditions the reference should take place (*q*).

Wife of a lunatic.

Where there is no committee the wife of the lunatic has been held to have a sufficient implied authority to sue in his name for debts due to him (*r*). It does not appear whether the courts would hold that implied authority gave her power to refer either the action or the demand upon which it was founded.

Submission by public officer.

vii. *Public officer.*]—Where a public company are authorized by act of parliament to sue and be sued in the name of

(*n*) Spivy v. Webster, 2 Dowl. 46.

(*o*) Davies v. Ridge, 3 Esp. 101.

(*p*) Shelford on Lunatics, p. 179, 396; Dane v. Viscountess Kirkwall, 8 C. & P. 679.

(*q*) In re Baker. Shelford on Lunatics, 204.

(*r*) Rock v. Slade, 7 Dowl. 22.

one of their public officers, who, however, is not to be personally answerable, the officer by consenting to refer a cause does not incur any personal responsibility. No attachment will be granted to enforce the award against him, though in many instances the company will be compelled to obey the award by a mandamus (*s*).

SECTION III.

PERSONS EMPOWERED TO REFER BY STATUTE.

Assignees of bankrupts.

1. *Assignees of bankrupts and insolvents.*]—By stat. 6 Geo. IV. c. 16, s. 88, the assignees of a bankrupt, with the consent of the major part in value of the creditors present in person or by proxy, under a power of attorney (*a*), or in a certain case with the consent of the commissioners, on due notice being given according to the act, may refer to arbitrators any dispute concerning any matter relating to the bankrupt's estate (*b*). The party with whom the dispute is had is to be the other party to the reference.

Want of proper consent to the reference.

The effect of this enactment does not, it is apprehended, disable the assignees from referring without such consent, but only renders them liable for the consequences to the creditors (*c*).

Special consent necessary.

On a clause in an old Bankruptcy Act, the 5 Geo. II. c. 30, s. 34, very similar to that of the present act, which, however, did not require notice of the purport of the meeting to be given beforehand, Lord Hardwicke held that the creditors

(*s*) Corpe v. Glyn, 3 B. & Ad. 801.

(*a*) Bannatyne v. Leader, 3 M. & C. 379.

(*b*) See the Appendix of Statutes for the section at length. See P. 1, ch. 3, s. 7, d. 2.

(*c*) Jones v. Yates, 3 Y. & J. 373; Piercy v. Roberts, 1 M. & K. 4.

could not give a general power to assignees to submit matters to arbitration at their own discretion, but that they must have a special meeting upon notice given for that purpose in the London Gazette, to consider the particular case intended to be submitted to arbitration (*d*). This, according to Lord Kenyon, was not a solitary decision, but the point was repeatedly so determined by Lord Hardwicke (*e*). Like executors, assignees of bankrupts by entering into a submission will, unless they protest against the reference, be held to have admitted that they have sufficient funds in hand to pay what the award directs (*f*).

Reference admission of sufficient funds.

The bankrupt himself cannot make a valid submission respecting his estate. An award made on a submission by a bankrupt was in one case held binding on his assignee, but that decision was reversed in the House of Lords (*g*). And when an award made on a submission between a creditor and a bankrupt after an act of bankruptcy was received by the commissioners as conclusive evidence of the amount of the debt, the Lord Chancellor directed the proof of the debt to be expunged, and that an inquiry into the amount should be made before the commissioners (*h*).

Bankrupt no power to refer.

On a reference by a party before his bankruptcy, it is only against the bankrupt that proceedings to enforce the award can be taken, for the assignees clearly cannot be affected by an award to which they are not assenting parties (*i*).

Assignees not affected by award unless they consent.

If, however, the assignees are chosen while the reference is still pending, it seems proper that they should be called before the arbitrator (*k*); and if they appear before him and adopt the proceedings, they will be bound by the award (*l*).

(*d*) (Ex parte) Whitchurch, 1 Atk. 91.
(*e*) Nerot v. Wallace, 3 T. R. 17.
(*f*) Robson v. —, 2 Rose, 50.
(*g*) Whiteacre v. Pawlin, 2 Vern. 229.
(*h*) (Ex parte) Kemshead, 1 Rose, 149.
(*i*) Marsh v. Wood, 9 B. & C. 659.
(*k*) Taylor v. Shuttleworth, 8 Dowl. 281.
(*l*) Dod v. Herring, 3 Sim. 143; S. C. on app., 1 Russ. & M. 153.

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Assignees of insolvent debtors.

The assignees of insolvent debtors, under the stat. 1 & 2 Vict. c. 110, s. 51, are authorized to submit questions to arbitration provided they have the consent of the major part in value of the creditors, and the approbation of the court or of a commissioner (*m*).

Want of proper consent to the reference.

The declaration in an action on the award by the assignee is not bad for want of an allegation of proper consent to the reference (*n*), nor can the want of it be pleaded as a defence by a stranger to proceedings by the assignee (*o*); although, like an assignee of a bankrupt, the latter, if he refer without a proper authority, may incur a liability to the creditors.

Liability of assignees.

When the trustees of an insolvent debtor had submitted to a reference, and the award directed them to pay the costs, the court, in 1818, held that by entering into the arbitration bond they confessed that they had sufficient funds, and by referring all matters in difference and agreeing to pay what should be awarded, they had made themselves liable for the payment of costs (*p*).

Assignees of insolvent petitioners.

Similar powers of referring to arbitration are by the statute 7 & 8 Vict. c. 96, s. 13, vested in the assignees of insolvent petitioners seeking the benefit of the statute 5 & 6 Vict. c. 116 (*q*).

Assignee of bankrupt or insolvent depositor in a savings' bank.

Disputes between the trustees and managers of a savings' bank and the assignee of a bankrupt or insolvent depositor do not seem to be affected by the above enactments, but to be wholly governed by those relating to savings' banks.

Trustees of savings' banks and members or their representatives.

II. *Savings' banks and Friendly societies.*]—By the statute 9 Geo. IV. c. 92, s. 45, relating to savings' banks, provision is made "that if any dispute shall arise between any such insti-

(*m*) See Appendix of Statutes for the section at length.

(*n*) Sutcliffe v. Brook, 9 Jur. 1112; S. C. 15, L. J., Ex. 118.

(*o*) Casborne v. Barsham, 6 Sim. 317.

(*p*) Wansborough v. Dyer, In re, 2, Ch. 40. See Davies v. Ridge, 3 Esp. 101.

(*q*) See the Appendix of Statutes for the clause at length.

tution or any person or persons acting under them, and any individual depositor therein, or any executor, administrator, next of kin or creditor, of any deceased depositor, or any person claiming to be such executor, administrator, next of kin, or creditor, then and in every such case the matter so in dispute shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of such institution, and the other by the party with whom the dispute arose, in case the arbitrators so appointed shall not agree, then such matter in dispute shall be referred in writing to the barrister-at-law" appointed to certify the rules of savings' banks (*r*).

No other remedy than arbitration.

Not only may the parties refer, but they must refer; for the words of this act have been construed to be compulsory, and to leave the parties no other remedy than that provided by the statute (*s*).

Trustees compelled to name an arbitrator.

It has been decided under this act, that if the trustees of a savings' bank, when called upon by a depositor, refuse to appoint an arbitrator on their part, pursuant to the statute to adjudicate on the depositor's claim, the Court of Queen's Bench will compel them by mandamus (*t*). Not so, however, when it is doubtful whether the parties claiming the sums on behalf of a society which has deposited money in the bank are lawfully entitled to represent it (*u*).

Stat. 7 & 8 Vict. c. 83.

A recent statute seems to deprive the parties of any choice in the selection of an arbitrator, for by the 7 & 8 Vict. c. 83, s. 14, it is enacted, " that if any dispute shall arise between the trustees and managers of any savings' bank, and any individual depositor therein, or any executor, administrator, next of kin, or creditor, or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings' bank, then and in every such case the matter in dispute shall

(*r*) See the Appendix of Statutes for the section at length. See P. 1, ch. 3, s. 7, d. 8.

(*s*) Crisp v. Bunbury, 8 Bing. 394.

(*t*) R. v. Mildenhall Savings' Bank, 6 A. & E. 952.

(*u*) R. v. Witham Savings' Bank, 1 A. & E. 321; R. v. Cheadle Savings' Bank, 1 A. & E. 323, n.

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be referred in writing to the barrister-at-law appointed" to certify the rules of savings' banks.

Friendly Society and members thereof.

If the rules of a friendly society prescribe that matters in dispute between the society or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be referred to arbitration, certain arbitrators, not beneficially interested directly or indirectly in the funds of the society, are, according to stat. 10 G. IV. c. 56, s. 27, to be named and elected at the first meeting of such society or general committee thereof that shall be holden after the enrolment of its rules (and the places of any arbitrator or arbitrators objecting or refusing or neglecting to act, are to be supplied as in the act directed), of whom not less than three are to be chosen by ballot in each such case of dispute; and the award of the chosen arbitrators, or of the major part of them, is to be final (*x*).

Stat. 9 & 10 Vict., c. 27.

The statute 9 & 10 Victoria, c. 27, s. 15, has recently enacted, "that every dispute between the trustees or managers of any friendly society and any member or officer thereof, or any executor, administrator, or next of kin of any such trustees, managers, member, or officer, or any creditor, or assignee of any trustees, managers, member, or officer of any such society, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money paid to such society, or to any benefit arising therefrom, or with respect to the management of the affairs of such societies for the settlement of which, according to the laws now in force, recourse must be had in England or Ireland to one of her Majesty's superior courts of law or equity, and in Scotland to the Court of Session, or Sheriff Court, may be referred in writing to the Registrar of Friendly Societies in England, Ireland, and Scotland, respectively; and where the value of such subject matter does not exceed 20*l*., every such dispute shall be so referred, unless in England or Ire-

(*x*) See the Appendix of Statutes; see P. 1, ch. 3, s. 7, d. 8.

land her Majesty's Attorney or Solicitor General, or in Scotland the Lord Advocate, shall certify in writing under his hand, that such dispute ought to be decided by the judgment of a superior court of law or equity."

III. *Promoters of public undertakings and railways.*]— Under "The Lands Clauses Consolidation Act, 1845," all parties having any estate or interest in the lands allowed by any special act of Parliament to be purchased or taken for the purposes of any undertaking authorized by the special act to be executed, may require the promoters of such undertaking to refer the question of compensation to arbitration in the manner provided by the act (*y*). Provision is made in the seventh section of the statute, for the case of persons under disability, trustees, and executors.

Parties interested in lands and the promoters of the undertaking.

Parties under disabilities.

Where a party claims compensation for damage or injury to his lands by any drainage operations under the 10 & 11 Vic. c. 38, the amount is to be assessed under the provision of "The Lands Clauses Consolidation Act, 1845," and the persons authorized to execute the works are to be deemed the promoters of the undertaking (*z*), and consequently would be the parties to a reference.

Landowners and parties draining by statute.

Railway companies formed under any act embodying "The Railways Clauses Consolidation Act, 1845," (*a*), and Joint Stock companies created by any statute incorporating "The Companies Clauses Consolidation Act, 1845" (*b*), are respectively empowered by the specified acts, to obtain the decision of arbitrators on certain matters in the manner prescribed in the respective acts (*c*).

Railway companies.

Joint stock companies.

(*y*) 8 & 9 Vict. c. 18. See Appendix of Statutes; see also P. 1, ch. 1, s. 1, d. 2, as to matters referable by statute; and P. 1, ch. 3, s. 7, d. 7, as to the mode of submission.

(*z*) 10 & 11 Vict. c. 38, s. 11.

(*a*) 8 & 9 Vict. c. 20. See Appendix of Statutes; see also P. 1, ch. 1, s. 1, d. 2.

(*b*) 8 & 9 Vict. c. 16. See Appendix of Statutes.

(*c*) See P. 1, ch. 3, s. 7, d. 7, as to the mode of submission.

PART I. CH. II. S. 3.

Ecclesiastical, &c., corporations, and their lessees, and adjoining owners.

IV. *Ecclesiastical and collegiate corporations, concerning their lands.*]—By Stat. 2 & 3 W. IV. c. 80, Archbishops, Bishops, Deans, Deans and Chapters, Archdeacons, Prebendaries, and Canons, and other dignitaries and officers of the several Cathedrals and Collegiate Churches and Chapels, and the Masters or other Heads and Fellows and Scholars, or other Societies of the several Colleges and Halls in the Universities of Oxford and Cambridge, and of the Colleges of Winchester and Eton, being corporations sole or aggregate, are empowered to enter into agreements of reference or deeds "of submission with his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators or assigns, or with the owner or owners of" any hereditaments adjoining to or intermixed with the manors, messuages, lands, tenements, tithes, or hereditaments of the above-mentioned corporations, for the purpose of settling finally any unknown or disputed boundaries, quantities or questions of identity as to the lands of such corporations in England and Wales. Sect. 3 enacts, that the guardians, husbands, committees, or attorneys of infants, married women, persons of unsound mind, or beyond seas, or under other legal disability or otherwise disabled from acting for themselves respectively, may bind the interests of those for whom they act (*d*).

Parties under disabilities.

Masters and workmen.

V. *Masters and workmen, concerning their trade.*]—Under the enactments for referring disputes between masters and workmen in trades and manufactures (*e*), by which either party may compel a settlement by arbitration, provision is made (*f*) for proceedings being taken by the husband when the complainant against the master is a married woman; and when an infant, for his being represented either by his father, mother, kindred, or sureties if an apprentice, or by some other person nominated by him in default of all the others.

Married women and infants.

(*d*) See the Appendix of Statutes.

(*e*) 5 G. IV. c. 96; 7 W. IV. & 1 Vict. c. 67, ss. 1, 2, 3; 8 & 9 Vict. c. 77, s. 3; 8 & 9 Vict., c. 128, s. 3. See the Appendix of Statutes; see P. 1, ch. 3, s. 7, d. 8, as to mode of reference.

(*f*) 5 G. IV. c. 96, s. 17.

VI. *Counties and boroughs, concerning prisoners' expenses.*] —The several parties interested in separate funds applicable to the purposes of the gaol of a city or borough, may compel a settlement by arbitration of any dispute respecting the proportion each fund is to contribute to the sum contracted to be paid to the county for the expense of the city or borough prisoners kept in a county gaol, by either party applying to the justices of the last or the next succeeding circuit, or to one of such justices to appoint by writing, under his or their hands, a barrister not having any interest in the question, to arbitrate between the parties (*g*).

Parties interested in prison funds.

The like mode is provided by the Municipal Corporation Act, for the settlement of any differences between the treasurer of a county and the council of any borough, respecting the treasurer's account of the costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial to the assizes from any borough in which a separate court of quarter sessions of the peace shall be holden (*h*).

Treasurer of county and council of borough.

When prisoners, committed from a borough with a separate court of quarter sessions, are kept in a county gaol not under contract, the amount of all the expenses of conveyance, transport, maintenance, safe custody and care of such prisoners shall, in case of dispute, be settled by such barrister-at-law as shall be determined upon in writing between the visiting justices of such prison and the council of such borough; and in case no appointment of such barrister be agreed upon by the said parties within fourteen days next after such dispute shall have arisen, by the arbitration of a barrister, to be named by the justices of assize, or one of them, as is provided in the statute of George the Fourth (*i*) recited previously (*k*).

Visiting justices of county and council of borough.

(*g*) 5 G. IV. c. 85, s. 2. See Appendix of Statutes; see P. 1, ch. 3, s. 7, d. 8.

(*h*) 5 & 6 W. IV. c. 76, s. 114. See Appendix of Statutes.

(*i*) 5 G. IV. c. 85, s. 2.

(*k*) 5 & 6 Vict. c. 98, s. 20. See Appendix of Statutes.

CHAPTER III.

HOW MATTERS MAY BE REFERRED TO ARBITRATION.

Contents of the third chapter.

THE different modes in which matters may be referred to an arbitrator, and the effect of each species of submission are considered in this chapter.

Section one contains some remarks applicable to submissions generally; section two treats of submissions by private agreement at common law and their disadvantages; section three, of submissions made under the Statute of William the Third; section four discusses the effect in law and equity, of the common provision in deeds and agreements, that if any disputes shall arise they shall be decided by arbitration; and section five, in like manner enlarges on the effect of a negative agreement, not to proceed by action or suit respecting such differences; submissions made in a cause at common law, their effects on the court and the parties, form the subject of section six; section seven comprises an enumeration of some other forms of submissions of a judicial character, or made under the authority of acts of Parliament; while section eight concludes the chapter with an account of the proceedings on the submission against a party who prevents an award being made.

SECTION I.

OF SUBMISSIONS IN GENERAL.

I. *General qualities of a submission.*]—Matters may be referred to arbitration in any manner that expresses the agreement of the parties to be bound by the decision of the person chosen to determine the matters in controversy. This person is styled the arbitrator, and the agreement conferring on the arbitrator his binding authority, is termed the submission (*a*).

No particular form of submission necessary.

No formal submission, either verbal or written, is necessary (*b*). It may be contained in a clause quite collateral to the main purpose of an agreement. Thus a bond, conditioned "for A.'s due discharge of the duties of clerk," "to be ascertained by the inspection of A.'s accounts by J. S., and the amount so ascertained to be liquidated damages," is a submission to the award of J. S. respecting the accounts (*c*). So also a cognovit in the words, "I hereby confess the action, and that the plaintiffs have sustained damages to the amount of one shilling besides their costs, to be taxed by the prothonotary as he shall think the plaintiffs entitled," is an appointment of the prothonotary to arbitrate respecting the costs. His decision is binding, and will not be reviewed by the court (*d*).

Intention of parties to bind themselves.

But the parties must manifestly intend to be concluded by the decision of the person called in, in order to clothe him with the authority of an arbitrator.

Hence, where it was the practice for one of the proprietors of a stage coach to adjust the accounts from time to time, apportioning the profits and charges, and the other proprietors were in the habit of receiving or paying according to his

(*a*) Bac. Ab. Arb. B. & D.
(*b*) Bac. Ab. Arb. B.
(*c*) Jebb v. M'Kiernan, Moody & M. 340.
(*d*) Elvin v. Drummond, 1 M. & P. 88, S. C. 4 Bing. 415.

apportionment, it was held that he was to be considered rather the common servant of them all than an arbitrator; for the acquiescence of the others in the correctness of his past accounts did not of itself manifest any intention on their part to deprive themselves of the power of questioning the correctness of future adjustments (*e*).

Like other contracts when in writing, the submission must be duly executed; and where the accession of all parties to the reference is the consideration to each to execute the submission, it is not valid as to some who have executed it until all have done so, even although it purposes to refer all matters in difference between them or any two of them (*f*).

Testator appointing an arbitrator to settle disputes concerning his will.

A testator cannot make a valid appointment by will, that if any differences should arise respecting his will, these shall be determined by a specified arbitrator, whose decision is to be final (*g*).

Advisable to take a warrant of attorney as collateral security.

II. *Taking collateral security to enforce the award.*]—It is sometimes prudent to take a warrant of attorney to confess judgment for a specific sum as a collateral security for the performance of an award, in order that execution may be immediately taken out, either against the property or the person of him who neglects or refuses to perform the award; for although we shall see that performance can now generally be enforced by attachment, yet, as that process only issues from a court of law in term time, if the award were made in vacation, or too late in term for the opposite party to show cause against a rule for an attachment, the successful party would have to wait till the next term for the assistance of the court. The defeazance of the warrant of attorney should contain the substance and effect of the bond or agreement of submission, with a declaration that no execution should issue until non-performance of the award.

Such a security is peculiarly beneficial in the case of the

(*e*) Carr v. Smith, 5 Q. B. 128; Goodyear v. Simpson, 15 M. & W. 16.

(*f*) Antram v. Chace, 15 East, 209.

(*g*) Philips v. Bury, Skin. 469.

submission of the title to land whenever it is probable that the award may direct a change of possession; for if a party in possession be awarded to deliver possession of land to the other, and although apprehended on an attachment for disobedience to the award in not delivering possession, continue obstinate, the only mode by which possession can be obtained is by ejectment; whereas, a warrant of attorney to confess judgment in ejectment, with a defeazance that no execution shall be taken out unless the arbitrator shall, by his award, direct the defendant to yield possession, and he shall neglect to do so on or before the day appointed by the award, would obviate the necessity of an ejectment in such cases, and would not put the opposite party in any worse condition (*h*).

Conveying lands to arbitrator on trust to convey pursuant to award.

When the nature of the case is such as to require conveyances of lands, as when a partition is to be made, and it is considered probable that a difficulty may be experienced in compelling a party to execute conveyances pursuant to the award, the expedient may sometimes with advantage be adopted of conveying the entirety of the lands in the first instance to the arbitrator upon trust, to convey to the several parties the portions that shall be respectively awarded to them (*i*).

Submission before action no bar to action.

III. *Arbitration pending cannot be pleaded.*]—A mere submission of a dispute to arbitration does not prevent a party from bringing an action respecting the same matter (*k*). The question was open to some degree of doubt till lately; for in an action on a policy of insurance the court, in deciding that it well lay, notwithstanding it appeared in the declaration that there was an agreement in the policy to refer any disputes, and that there had been no reference,

(*h*) Jarman & Bythewood's Conv., Vol. II. p. 701, 3rd ed.; p. 639, 2nd ed. See Doe d. Greville v. Roper, Harr. Woodf. Land. & Ten., p. 790, 4th ed.; Doe d. Morris v. Rosser, 3 East, 15.

(*i*) 6. Jarman & Bythewood Conv. 586, 3rd ed.

(*k*) Harris v. Reynolds, 7 Q. B. 71.

added the expression, "that if there had been a *reference depending*, or made and determined, it might have been a bar; but as no reference has been, *nor any depending*, the action is well brought" (*l*). So also in another action on a policy with a similar provision for arbitration, where the arbitrator named in the instrument had proceeded to consider the disputes, the court, is reported to have held the action maintainable, using this qualifying observation, "it not appearing that the plaintiff had assented to the reference after the loss (*m*)."

Arbitration pending no plea.

But in a recent case, where the law on the subject was fully discussed, and the cases cited, it was formally decided on demurrer, that the pendency of an arbitration could not be pleaded in bar to an action of debt for the same demand (*n*).

Proceedings stayed in action brought after reference.

If the submission contains a stipulation that no action shall be brought, the court will, on application, stay the proceedings in any action commenced contrary to the agreement (*o*).

But where, by a deed of partnership in case of dispute each party was to appoint an arbitrator, and the two arbitrators were to appoint an umpire before they commenced proceedings, the court refused to stay proceedings in an action, as, although the arbitrators were appointed, they had not selected an umpire, and the appointment of an umpire was held by the court a condition precedent to the acting of the arbitrators (*p*).

(*l*) Kill v. Hollister, 1 Wils. 129.

(*m*) Harrison v. Douglas, K. B. M. T. 4 W. IV.; Watson on Awards, p. 10, n. 6, 3rd ed.

(*n*) Harris v. Reynolds, 7 Q. B. 71.

(*o*) Dicas v. Jay, 6 Bing. 519; Moscati v. Lawson, 1 H. & W. 572.

(*p*) Bright v. Durnell, 4 Dowl. 756.

SECTION II.

OF SUBMISSIONS WHICH CANNOT BE MADE RULES OF COURT.

1. *Parol submission.*]—A parol submission is generally perfectly valid. If, on the hearing of a summons before a judge, the parties consent that he shall adjudicate on the case, such consent is a parol submission to him as arbitrator, and his submission is binding as an award (*a*). It often happens in practice, that where the submission originally is in writing, that it is altered or added to by parol (*b*). Parol submission valid.

There are various disadvantages attending parol submissions. They are open, like other verbal contracts, to dispute respecting the exact terms used, which often become material, and awards made on them cannot be enforced by attachment, since a parol submission cannot be made a rule of court so as to give the court jurisdiction (*c*). Disadvantage of a parol submission.

When a reference takes place at nisi prius, and a verdict is taken subject to it, but no order of reference is drawn up, the authority of the arbitrator depends solely on the parol submission of the parties, and in such case the jurisdiction of the court does not attach, as on a reference by order of nisi prius, to compel the attendance of witnesses (*d*), though, where the arbitrator has to certify the amount of damages, a verdict may be entered for the amount ascertained by his certificate (*e*).

A parol submission is sometimes ineffectual. For example, if, on such a submission, a written award is made respecting real property, and the provisions of the award are such, that if they had been verbally agreed to by the parties Parol submission sometimes ineffectual.

(*a*) Harrison v. Wright, 13 M. & W. 816.
(*b*) ——— v. Mills, 17 Ves. 419; Ashworth v. Heathcote, 6 Bing. 596.
(*c*) Ansell v. Evans, 7 T. R. 1; ——— v. Mills, 17 Ves. 419.
(*d*) Curtis v. Bligh, 3 Jur. 1152.
(*e*) Tomes v. Hawkes, 10 A. & E. 32.

themselves, they would have been void by the statute of frauds, the award cannot be enforced as to them since the parol submission and written award form but one parol contract (*f*).

Submission in writing not under seal valid.

II. *Submission by agreement in writing not under seal.*]—Parties may refer their differences by agreement in writing not under seal.

Requires agreement stamp.

Such submissions require an ordinary agreement stamp. One stamp only is necessary, although there are many parties to the submission having separate legal interests, provided they have a sufficient community of interest in the subject matter of the reference; as in the case of a submission between the party who has insured a ship, and the underwriters on the policy (*g*). Where there was a written agreement that a disputed boundary was to be set out by "an indifferent surveyor residing at a distance," and on the same sheet of paper was added a memorandum of a later date, appointing a particular surveyor, residing in the neighbourhood, to set out the boundary, the two memorandums were held to be only one agreement, and to require only one stamp (*h*).

An agreement, indorsed on an arbitration deed, or bond, enlarging the time, or changing the arbitrator is a new submission in writing, incorporating into itself all the terms of the original submission (*i*), and requires an agreement stamp. (*k*)

Submission by bond common.

III. *Submission by bond.*]—A submission by bond is a very ordinary mode of effecting a reference.

(*f*) Walters v. Morgan, 2 Cox. 369; See P. III. ch. 4, s. 1, d. 2, enforcing award in equity.

(*g*) Goodson v. Forbes, 1 Marsh 525, S. C. 6 Taunt. 171; Stephens v. Lowe, 9 Bing. 32.

(*h*) Taylor v. Parry, 1 M. & G. 604.

(*i*) Greig v. Talbot, 2 B. & C. 179; Tunno v. Bird, In re, 5 B. & Ad. 488; Evans v. Thompson, 5 East, 189.

(*k*) Stephens v. Lowe, 9 Bing. 32, S. C., 2 M. & Sc. 44.

Each party usually executes a bond to the other in a certain penalty, subject to the condition of his abiding by and performing the award of the person named as arbitrator. The penalty in the bond does not limit the amount the arbitrator may award, although, if he exceeds that limit, no larger sum than the penalty can be recovered by action on the bond (*l*).

Damages limited by the penalty in the bond.

The submission of the parties is contained in the conditions of the mutual bonds, for they together make up but one agreement of reference. The terms of the condition may be altered by an instrument under seal, without affecting the bond (*m*). Where there is a dispute between A. of the first part, and B. and C. of the second part, a submission to reference may be effected by a bond given by A. to B. and C. jointly, and by separate bonds given by B. and C. respectively to A., conditioned to perform the award; for the three bonds together will constitute but one submission (*n*). Two bonds, however, will be a valid though unskilful method of settling by arbitration the affairs of a partnership of several persons. Thus, a joint and several bond of A., B., and C., three of six partners to D., E., and F., the other three, and a like bond of D., E., and F. to A., B., and C., both conditioned to abide an award respecting all accounts and matters in difference between the six, or any of them, will authorize an award directing, among other things, A. to pay a sum to B., and B. may maintain an action of debt on the *award* against A., but not an action against him on the *bond*, for A. is not bound to him by that instrument; it seems also that D., E., and F., to whom A. is bound, might sue him on the bond for his disobedience of the award in neglecting to pay the sum of money to B. (*o*). Instead of binding themselves by a penalty to each other, the litigant parties may join in a bond to the arbitrator, conditioned to perform his award. Such a bond was held good although it was sug-

Alteration of submission by bond.

Separate bonds.

Two bonds many parties.

Bond to the arbitrator.

(*l*) Browes v. Bruce, Watson on Awards, p. 4, note (3), 3rd Ed.

(*m*) Greig v. Talbot, 2 B. & C. 179.

(*n*) Hayes v. Hayes, Cro. Car. 433.

(*o*) Winter v. White, 1 B. & B. 350.

gested that the arbitrator might make an unreasonable award in order to entitle himself to the penalty (*p*).

Stamp on submission by bond.

An arbitration bond must be stamped with a bond stamp, and it does not require an agreement stamp also, because, in addition to the usual clauses, it contains a stipulation respecting the manner in which the costs are to be paid. Such stipulation is not to be considered as a substantive agreement (*q*).

Sufficient under the statute of frauds as to lands.

A submission by bond, referring to an arbitrator to settle the price per acre the purchaser is to pay for an estate seems to be a sufficient agreement in writing, respecting the sale of lands, to satisfy the requirements of the statute of frauds, and when the award is made to enable the Court of Chancery to enforce a specific performance (*r*).

Submission by deed valid.

IV. *Submission by deed.*]—A mode of referring not unfrequently adopted, is by indenture, containing mutual covenants to stand to the award (*s*). Such a submission cannot be altered by parol, or written agreement even when indorsed upon it (*t*).

One party only executing under seal.

It seems to be no objection to the validity of the submission, that one party is bound by deed and the other by agreement not under seal; as for instance, on a reference between a private individual and a corporation, which the former signs, but to which the seal of the latter is affixed (*u*).

V. *Disadvantage of these kinds of submissions.*]—Some serious objections exist to referring matters to arbitration by the forms of submission discussed in this section, considered, as we have at present treated of them, independently of the statute of the 9 & 10 W. III. c. 15. (*x*)

(*p*) Owdy v. Gibbons, Comb. 100.

(*q*) Wansborough v. Dyer, In re, 2 Chitt. 40.

(*r*) Cooth v. Jackson, 6 Ves. 11.

(*s*) Spooner v. Payne, 16 L. J. C. P. 225; Bac. Ab. Arb. B.

(*t*) Morphett, In re, 2 D. & L. 967.

(*u*) Tomlin v. Mayor, Fordwich, 6 N. & M. 594.

(*x*) See the next section.

In cases where the statute has no application, a submission of matters in difference when there is no cause in court, does not by common law give the court any jurisdiction, either over the submission itself, or over the proceedings before the arbitrator, or over the award. The parties are not before the court in any way, and the submission is viewed as a contract simply.

No jurisdiction of the courts by common law.

Either party may, at any time before the award is made, revoke the authority of the arbitrator (*y*), and render all that has been done in the reference ineffectual, though by so doing he makes himself liable to an action.

Submission revocable.

The awards made on such submissions cannot be set aside by a court of law, however gross the misconduct or corruption of the arbitrator (*z*). The only remedy is by bill in equity (*a*).

No setting aside improper awards.

Nor can the awards, when valid, be enforced by attachment or other summary process of the court. The benefit of them can only be obtained, as on a contract, by action, or sometimes, when the nature of the award admits, by proceedings in equity for a specific performance (*b*).

No summary enforcement of award.

Action and suit only means.

SECTION III.

OF SUBMISSIONS WHICH MAY BE MADE RULES OF COURT UNDER THE STATUTE OF WILLIAM THE THIRD.

Object of the statute

1. *Effect of the statute* 9 & 10 *W. III. c.* 15.]—Before

(*y*) See P. 11, Ch. 3, 5, 3 d. 1, Revocation at Common Law.

(*z*) Veale v. Warner, 1 Saund. 327, c. note.

(*a*) Greenhill v. Church, 3 Rep. in Chanc. 89, p. 49, 2 Vern. 100, pl. 95; Cavendish v. ———, 1 Cas. in. Chanc. 279.

(*b*) Blundell v. Brettargh, 17 Ves. 232; Bishop v. Bishop, 1 Rep. in Chanc. 75; Bendick v. Thatcher, Noy, 141, Vin. Ab. Arb. H. a. 1.

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the statute, the 9th & 10th W. III. c. 15, entitled, "An act for determining differences by arbitration," became law, when persons were out of court they could not, by any agreement, bring themselves into court, and create a jurisdiction to issue process of contempt (*a*). Experience had proved the beneficial effect of terminating by arbitration suits actually existing; and it occurred also that it might be extremely desirable to afford the same opportunity where only a cause of suit subsisted but no suit had been instituted (*b*). To effect, therefore, these two objects, first to give the parties the process of contempt for enforcing the award, and next, to make awards final unless complaint was made within a limited time (*c*), the statute of W. III. was passed (*d*).

Construction put upon the statute.

The statute is not very clearly worded in its provisions, and much discussion has been raised respecting its terms. But the result of many decisions has now put a judicial interpretation on all of them. The whole act taken together has been construed to mean this; though there be no cause in any court, and the matter referred be entirely of a private nature, if the submission contain an agreement for making the submission a rule of court, that the party in whose favour the award is made may enforce it by the process of the court where the submission is made a rule, unless it shall appear to *that* court that it ought to be set aside as unduly made, and in such case the *same* court shall not merely refuse the aid of its process, but if complaint be made within the time limited shall actually proceed to set it aside (*e*). For although section one provides that the process of the court in which the submission is made a rule to enforce the award, shall not be stayed by "any *other* court of law or equity," except it shall appear to *such* court that the award was procured by corruption or undue means, implying as it were, that in the excepted case another court might in-

(*a*) Nichols v. Chalie, 14 Ves. 265; Lyall v. Lamb, 4 B. & Ad. 468; Steers v. Harrop, 1 Bing. 133, S. C. 7 Moore, 466.

(*b*) Nichols v. Chalie, 14 Ves. 265.

(*c*) Davis v. Getty, 1 S. & S. 411.

(*d*) See Appendix of Statutes for the Act.

(*e*) Dawson v. Sadler, 1 S. & S. 537.

terpose, and although in section two it is provided that an award procured by corruption or undue means shall be set aside by *any* court of law or equity, yet the proviso att he end of section two, that complaint of such corruption or undue practice must be made to *the* court of which the submission is a rule, has been held to limit the generality of the previous words, and to show the intention of the legislature that the court in which the complaint is to be made, that is, the court of which the submission is a rule, is the only court which has jurisdiction over the award, either to enforce it by attachment or to set it aside.

Jurisdiction of equity under it.

Though the courts of equity yielded reluctantly to the force of the Act of Parliament, it is now settled, that when the submission is agreed to be made a rule of another court, whatever equitable ground there may be for impeaching the award, the jurisdiction of equity to set it aside is entirely taken away, and transferred to the court of which the submission is made a rule (*f*).

Chancery, a court of record within the statute.

The statute (*g*) provides for the making the submission a rule of "any of his majesty's courts of *record*." These words have been held to include the Court of Chancery, which, although not a court of record as regards its equitable authority, still, as regards its common law jurisdiction, is a court of record (*h*). Instances are very numerous of submissions having been made rules of this court under the statute without question, and the awards made pursuant to them enforced by the compulsory process of the court (*i*).

The second section also of the act shows that the Court of Chancery is intended to be included, since it expressly mentions courts of equity as having jurisdiction to set aside awards, and that jurisdiction we have already seen only lies in the

(*f*) Nichols v. Roe, 3 M. & Keen, 431, reversing judgment of Vice-Chanc. in same case, 5 Sim. 156; Nichols v. Chalie, 14 Ves. 265; Gwinnett v. Bannister, 14 Ves. 530; Heming v. Swinnerton, 1 Coop. C. C. 386.

(*g*) 9 & 10 W. III. c. 15, s. 1.

(*h*) 2 Madd. Chanc. Practice, 840 3rd ed., 712 2nd ed.; Pownall v. King, 6 Ves. 10.

(*i*) Webster v. Bishop, 2 Vern. 444; Smith v. Symes, 5 Madd. 74; Joseph v. Webster, In re, 1 Russ. & Mylne, 496.

court of which the submission is made a rule (*k*). And in a very recent case, on the objection being made, Lord Cottenham, C., treated it as a point long settled that the Court of Chancery was a court of record within the act (*l*).

Limit of time for setting aside award, none for enforcing it.

The statute limits no time within which application to enforce the award must be made. But the party who seeks to set it aside must make his application to the court before the last day of the next term after the award is made; and this, whether the objection appears on its face, or whether it is for matter extrinsic, as for fraud of parties, or for misconduct or corruption of the arbitrator (*m*). It is true, when the award is bad on its face, though it cannot be set aside after the time, no action can be maintained upon it, nor will an attachment be granted to enforce it (*n*).

Making submission rule of court.

The submission must be made a rule of court before the court has any jurisdiction either to enforce or set aside the award (*o*).

No execution on rule of court.

The only summary mode of enforcing the award is by attachment. No judgment can be entered or execution issue on the rule embodying the submission. Hence, if the party die before the award be performed, as the right to an attachment dies with the person, the benefit of the statute is lost, and the party will be left to his action or suit against the executor (*p*).

Parol submission not within the statute.

II. *What references within the statute.*]—A parol submission cannot be made a rule of court within the statute, for the statute provides that the parties shall "*insert*" their consent to make the submission a rule of court into the sub-

(*k*) Ante, p. 58, Dawson v. Sadler, S. & S. 537; see note to Joseph & Webster, In re, 1 Russ. & Mylne, 496.

(*l*) Heming v. Swinnerton, 10 Jur. 907.

(*m*) Davis v. Getty, 1 S. & S. 411; Auriol v. Smith, 1 Turn & R. 121; Allardes v. Campbell, 1 Turn. & R. 133 n.; Pedley v. Goddard, 7 T. R. 73.

(*n*) Auriol v. Smith, 1 Turn. & R. 121; Pedley v. Goddard, 7 T. R. 73.

(*o*) Davis v. Getty, 1 S. & S. 411; Harvey v. Shelton, 7 Beav. 455.

(*p*) Webster v. Bishop, Prec. in Chanc. 223.

mission itself, and the word insert must mean an act that infuses that consent into something written (*q*).

Submission of a cause and all matters.

Though an order of nisi prius, referring a cause, is made a rule of court by virtue of the inherent common law jurisdiction of the courts; yet where a cause and all matters in difference are referred by such an order, it seems not yet to have been clearly decided whether the authority to make it a rule of court, as to the matters not in the cause is derived from common law or from the statute (*r*). In a late case, a submission by agreement out of court of a cause, and all matters in difference, was made a rule of court, though there was no consent clause at all for making it such a rule. The circumstances, however, under which it was so made, do not appear in the report (*s*).

Of a cause by agreement.

Of cause to be made rule of another court.

A reference of a suit in chancery by agreement out of court, containing a clause to make it a rule of the Court of King's Bench, is a submission, not in the cause but out of it, and proceeds on the jurisdiction given by the statute (*t*).

Or of either of two courts.

In like manner, a reference by deed of causes in the King's Bench and Exchequer, with a clause to make the submission a rule of either court, is under the statute (*u*); so also of a cause in the Exchequer which is referred by a judge's order, providing that it shall be made a rule of the Court of Queen's Bench (*x*).

Of a cause by agreement to be made rule of same court.

If a cause in the Court of King's Bench be referred by agreement out of court, containing a clause for making it a rule of the same court, the reference is under the statute and not at common law (*y*). So also the reference of a suit in chancery, and all matters in difference by private agreement, providing for making the submission and award a rule of chancery, derives its efficacy from the act (*z*).

(*q*) ——— v. Mills, 17 Ves. 419; Ansell v. Evans, 7 T. R. 1.

(*r*) Lord Lonsdale v. Littledale, 2 Ves. Jr. 451; Lucas v. Wilson, 2 Burr. 701; Anderson v. Coxeter, 1 Strange, 301; Hayward v. Phillips, 6 A. & E. 119; Allenby v. Proudlock, 4 Dowl. 54, S. C. 4, A. & E. 326.

(*s*) Little v. Newton, 1 M. & G. 977, n. (*a*).

(*t*) Nichols v. Chalie, 14 Ves. 265.

(*u*) Wimpenny v. Bates, 2 Tyr. 466, S. C.; 2 C. & J. 379.

(*x*) Milstead v. Craufield, 9 Dowl. 124.

(*y*) Rushworth v. Barron, 3 Dowl. 317; Reynolds v. Askew, 5 Dowl. 682.

(*z*) Heming v. Swinnerton, 1 Coop. C. C. 386.

PART I. CH. III. s. 3.

Of matters in ecclesiastical suit.

Where a bond of submission between the trustee of a wife and the husband recited, that the wife had instituted a suit in the Ecclesiastical Court for a separation and a divorce a mensâ et thoro, and that in order to prevent further litigation and disputes touching the terms on which the divorce was to be had, and also to terminate and put a final end to the suit, and to any question which might arise respecting the children of the marriage, it had been agreed to refer all matters in contest and dispute between the wife and husband to a certain arbitrator; on application to the Court of Common Pleas to make the submission a rule of court under the statute, it was objected, that as the matter in dispute was only the subject of a suit in the Ecclesiastical Court, the Statute of W. III., which is expressly confined to "controversies, suits, and quarrels, for which there is no other remedy but by personal action or by suit in equity," gave no authority to the Court of Common Pleas to make the submission a rule of court; but the objection was overruled, the court observing that many causes of action at law and many suits in equity might arise out of the disputes stated in the recital of the bond (*a*).

Of indictment.

Criminal proceedings are not within the statute; for where an indictment for an assault, and all matters in dispute between the prosecutor and defendant were referred by bonds containing a consent clause, the court thought such a reference, comprehending the subject matter of an indictment could not be made a rule of court, and that the words "controversies, suits, and quarrels," in the statute, meant only *civil* disputes between the parties (*b*).

Of differences not existing before submission.

The act contemplates controversies existing before the submission, and differences for which there is a legal or equitable remedy, but not it seems, subjects of arbitration which cannot be classed under these heads; therefore, where an agreement to sell land at a price to be fixed by arbitrators, was made a rule of court under a consent clause, the

(*a*) Soilleux v. Herbst, 2 B. & P. 444.

(*b*) Watson v. M'Cullum, 8 T. R. 520; R. v. Bardell, 5 A. & E. 619, S. C. sub. nom., R. v. Shillibeer, 5 Dowl. 238.

question submitted being only co-existent with the submission, the court, on an application to enforce the award by attachment, doubted very much whether this agreement was within the statute, and dismissed the motion (*c*).

III. *What a sufficient consent clause.*] — Though the statute requires that the agreement to make the submission a rule of court shall be inserted in the submission or condition of the arbitration bond, yet where the consent clause was no part of the condition of the bond, but was written under it and not signed; on its appearing by affidavit that it was thus written before the execution of the bond, it was taken by the court to be part of the submission, and the submission was made a rule of court (*d*).

Consent clause.

Clause written under bond.

If on an arbitration bond or deed of submission, having the usual consent clause for making the submission a rule of court, is afterwards endorsed an agreement of the parties to enlarge the time, but which contains no repetition of the consent clause in itself, the endorsed agreement becomes a new submission, incorporating the remaining terms of the instrument within, and may be made a rule of court, under the statute with reference to the enlarged time, instead of the time originally specified (*e*).

Indorsement incorporates clause within.

A conditional clause in an arbitration bond in this form, "And if the obligor shall consent that this submission be made a rule of court then," &c., has been held to contain a sufficient indication of consent to authorize the making the submission a rule of court (*f*). If the clause is for making the submission a rule of "*the*" court, without specifying which court, it is sufficient, and the parties may elect which court they please (*g*).

Conditional clause.

Not specifying which court.

(*c*) Lee and Hemingway, In re, 3 Nev. & M. 860.

(*d*) Carter v. Mansbridge, Barnes, 55.

(*e*) Greig v. Talbot, 2 B. & C. 179; Evans v. Thomson, 5 East, 189; Tunno & Bird, In re, 5 B. & Ad. 488; Jenkins v. Law, 8 T. R. 87, overruled.

(*f*) Bailey v. Cheesely, 1 Salk. 72, S. C., 1 Ld. Raym. 674.

(*g*) Soilleux v. Herbst, 2 B. & P. 444.

Alternative clause.

If it provides in the alternative, that the submission shall be made a rule of the Court of King's Bench or Exchequer (*h*), or if it is drawn up for making it a rule of the court of King's Bench, or an order of the Court of Chancery (*i*), that authorizes the making the submission a rule of either court but not of both.

Consent to make the award a rule of court.

Frequently the clause is worded for making the *award*, not the *submission*, a rule of court. In the older cases this was held an insufficient consent (*k*). Subsequently a laxer rule was adopted as more sensible, and such submissions were allowed to be within the operation of the statute (*l*). Now, however, it seems a sort of middle course will be adopted; the court will examine whether the word "award" has been used by mistake for submission; if that be the case, the submission may still be made a rule of court; but if the intention of the parties appears to be that the award itself should be made a rule of court, although that intention can not be carried into effect, the statute will not apply (*m*).

SECTION IV.

OF AGREEMENTS TO REFER FUTURE DISPUTES TO ARBITRATION.

Whether agreement to refer future disputes a submission.

I. *Effect as a submission of an agreement to refer future disputes.*]—There is often a covenant or agreement in deeds of partnership, policies of insurance, and other instruments, providing that if any disputes shall arise they shall be referred to arbitration. The arbitrators generally are to be

(*h*) Wimpenny v. Bates, 2 Tyr. 466, S. C., 2 C. & J. 379.

(*i*) Dawson v. Sadler, 1 S. & S. 537.

(*k*) Harrison v. Grundy, 2 Stra. 1178; Anon. 2 Barnard, 163.

(*l*) Story, In re, 7 A. & E. 602; Soilleux v. Herbst, 2 B. & P. 444; Pedley v. Westmacott, 3 East, 602; Powell v. Phillips, cited in Pedley v. Westmacott, 3 East, 602; 2 Tidd. Pr. 821, 9th ed.

(*m*) Woodcroft and Jones, In re, 9 Dowl. 538.

appointed by the parties, or some third person, on the difference occurring. Sometimes the referees are designated in the original agreement.

When arbitrators not named.

When they are not so named, the agreement to refer cannot, it is apprehended, be considered a submission; for until the arbitrator is determined, there is no one who has the binding authority to decide the questions submitted. Naming the arbitrator in the instrument is the rarer course; for it is open to the reasonable objection, that possibly by the time a difference arises and his assistance is required, he may, from age, infirmity, or other cause, have become unwilling or unfit to perform the duty.

When arbitrator named.

But when an arbitrator is named in the original clause, it seems to differ little, if at all, from an ordinary submission. There are no matters in dispute, it is true, existing at the time of the agreement to refer, but submissions are often drawn up providing for the determination of differences or calculation of damages arising after the date of the reference, and no objection seems to have been made that such were ineffectual without a fresh assent after the future matter of dispute has come into existence (*a*).

Specifying how arbitrator to be appointed.

When the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed, though contrary to the will of one of the disputing parties, this seems to have the same effect as if the referees were named in the clause itself. In a late instance where arbitrators so appointed fixed a meeting, a judge made an order compelling the attendance of witnesses before them. That order, it is true, was set aside on other grounds, but the party who objected and resisted the reference, never, according to the report, raised the objection (which if tenable would have been conclusive) that the agreement to refer did not amount to a submission (*b*). The court, however, took care to express no opinion on this point.

(*a*) Petch v. Fountain, 5 Bing. N. C. 442; Morphett, In re, 2 D. & L. 967; Brown v. Croydon Canal Company, In re, 9 A. & E. 522; Stephens v. Lowe, 9 Bing. 32; see Cleworth v. Pickford, 7 M. & W. 314, per Ld. Abinger, C. B. 321.

(*b*) Woodcroft v. Jones, In re, 9 Dowl. 538.

PART I. CH. III. S. 4.

Whether assent after differences arisen necessary.

In a former case, a sort of distinction was taken between a reference under such an agreement where the arbitrators were named, and a submission after dispute arisen; for on a motion for a new trial the court held that such a clause in a policy of insurance did not prevent the assured from bringing an action for a loss without proceeding under it, notwithstanding the referees specially named at the time of the commencement of the action were proceeding in the reference, and the court added the following expression:—"It not appearing that the plaintiff had assented to the reference after the loss" (*c*). This, however, does not show that the clause was not a submission, because a reference pending on an undoubted submission does not prevent an action being brought for the same cause (*d*).

II. *Effect in law of an agreement to refer future disputes.*]—The maxim often quoted, that an agreement to refer is not binding, and cannot deprive the court of its jurisdiction, seems sometimes to have been misunderstood (*e*).

Whether action lies on an agreement to refer.

In one instance where, however, it was not necessary to decide the point, the court was inclined to think that no action could be maintained for refusing to appoint an arbitrator pursuant to a covenant to refer, and that the covenant itself was futile and nugatory, and could not be enforced (*f*). In that case a person, in consideration of a specific premium paid him by another, took the latter into partnership for so long as they should mutually agree. By the deed of partnership it was covenanted between them, that if at any time either during or after the termination of the co-partnership any variance, dispute, doubt, or question should arise, happen, or be moved between the said parties or either of them, their executors or administrators, touching the joint concern or co-partnership, or any covenant, agreement clause,

(*c*) Harrison v. Douglas, K. B., M. T. 4 W. IV., Watson on Awards, p. 10, n. 6, 3d Ed.

(*d*) Harris v. Reynolds, 7 Q. B. 71.

(*e*) Thompson v. Charnock, 8 T. R. 139.

(*f*) Tattersall v. Groote, 2 B. & P. 131.

matter, or thing contained in the deed or in the construction thereof, or in anywise relating thereto, then every such variance, dispute, doubt, or question, should be determined by two indifferent persons, to be elected and chosen by the said partners, that is to say, one by each of them within twenty days next after such variance, dispute, doubt, or question should arise, happen, or be moved. After a dissolution of the partnership and the death of the party who paid the premium, his administratrix claiming a return of the money, proposed a reference, named an arbitrator, and on the refusal of the other party to name one on his part, brought an action on the covenant. Lord Eldon, C. J., and the Court of Common Pleas held the action would not lie, as the language of the deed did not extend the power of nominating an arbitrator to the administratrix, and also because large as the words of the clause were, they did not authorise a demand of an arbitration on the point whether the sum paid as the consideration of the articles should be returned (*g*).

When not for executors.

It is apprehended an action might be maintained on such a covenant; though, indeed, as it is ordinarily drawn up, only nominal damage seem recoverable, for the jury can have no means of calculating the amount. Lord Eldon therefore recommended as a prudential mode of drawing up such a covenant, that there should be added an agreement for the payment of a certain sum by way of liquidated damages in case of breach, in order to compel the parties to a specific performance of its terms (*h*).

No damages unless liquidated damages agreed on.

In one sense, it is true, such an agreement may be said not to be binding, for it cannot be pleaded in bar to an action in respect of the matters intended to be referred, and so does not oust the court of its jurisdiction (*i*); but in another sense it is binding, for there is nothing illegal in such a contract; and when it is acted on and an award has been made, the jurisdiction of the courts over the matter de-

Agreement to refer no plea in law.

(*g*) Tattersall v. Groote, 2 B. & P. 131.

(*h*) Street v. Rigby, 6 Ves. 814.

(*i*) Thompson v. Charnock, 8 T. R. 139; Harrison v. Douglas, Watson on Awards, 10, n. 6, 3d Ed.

cided by the arbitrator is gone, and all that the court have to say is, whether the award is good or not (*k*).

Submission no condition precedent to action.

A provision in a policy of insurance against fire, that if any difference should arise on any claim, it should immediately be submitted to arbitrators, and that no compensation should be payable until after an award determining the amount thereof should have been duly made, was not held by Best, C. J., to be such a condition precedent as to prevent an action on the policy by the assured, even although after the loss he had at first proposed to refer generally, but on that proposal being accepted by the office, afterwards refused to refer anything but the question of amount (*l*).

No specific performance of agreement to refer.

III. *Effect in equity of an agreement to refer future disputes.*]—It is now quite settled that equity will not entertain a bill for the specific performance of an agreement to refer to arbitration, or substitute the master for the arbitrators when they are not appointed by the deed and the parties refuse to name them (*m*).

No plea of in equity.

If a bill be filed for discovery, or for discovery and relief, the mere covenant or agreement to refer being an executory agreement only cannot be pleaded as a defence (*n*).

Ld. Redesdale's remarks.

With respect to the effect of a covenant to refer, it may not be out of place to quote the language of Lord Redesdale, who, in his treatise on Pleadings in Chancery, says, "It seems impossible to maintain that such a contract should be specifically performed or bar a suit, unless the parties had first agreed upon the previous question, what were the

(*k*) Cleworth v. Pickford, 7 M. & W. 314, per Ld. Abinger, C. B. 321.

(*l*) Goldstone v. Osborn, 2 C. & P. 550.

(*m*) Agar v. Macklew, 2 S. & S. 418; Mexborough, Earl of, v. Bower, 7 Beav. 127; Tattersall v. Groote, 2 B. & P. 131.

(*n*) Wellington v. M'Intosh, 2 Atk. 569; Street v. Rigby, 6 Ves. 815; Mitchell v. Harris, 2 Ves. Jr. 129, a.; Nichols v. Chalie, 14 Ves. 265: Waters v. Taylor, 15 Ves. 10; Benson v. Heathorn, 1 Y. & C., V. Ch. K. B. 326; Wood v. Rowe, 2 Bligh P. C., 595; 1 Daniel's Chanc. Pract. by Headlam, 638.

matters in difference, and upon the powers to be given to the arbitrators, amongst which the same means of discovery upon oath, and production of books and papers, as can be given in a court of equity, might be essential to justice. The nomination of arbitrators must also be a subject on which the parties must previously agree; for if either party objected to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person so objected to as a judge chosen by himself. It must also be determined that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which, if any of them involved important matter of law, they might not be deemed to be" (*o*).

Agreement to refer how useful in equity.

These clauses, however, are not without their use in equity; for the Court of Chancery will in some cases take notice of them. When the interests involved are complicated, and are such as cannot well be dealt with by the court, as in the case of the management of the concerns of the Opera House or of a large brewery, and an arbitration seems best adapted to do justice to all parties, a court of equity will not interpose until the prescribed step of an arbitration has been taken, and proved unavailing (*p*).

No ground for injunction.

If after a covenant to refer one party brings an action, although the other may exhibit his bill in equity and the covenant or agreement cannot be pleaded in bar, yet the court will not grant an injunction to restrain the proceedings at law (*q*).

Agreement to refer not a covenant not to sue.

A covenant to refer has been thought by some judges tantamount to a covenant not to take proceedings at law or equity (*r*); but that opinion has since been expressly overruled (*s*). For if, in addition to the agreement to refer, the parties bind themselves by negative words not to proceed at law or in equity respecting the matters intended to be de-

(*o*) Mitford, Pleadings in Chanc., 308, 5th Ed., 264, 4th Ed.

(*p*) Waters v. Taylor, 15 Ves. 10; Gourlay v. Duke of Somerset, 19 Ves. 429.

(*q*) Coop. Eq. Pl. 281.

(*r*) Tattersall v. Groote, 2 B. & P. 131.

(*s*) Street v. Rigby, 6 Ves. 814; Dimsdale v. Robertson, 2 Jones v. Latouche, 58.

cided by arbitration, the effect of the covenant seems altered, and is not to be judged, at least in equity, exactly by the same rules as a mere submission or covenant to submit to arbitration.

SECTION V.

OF AN AGREEMENT IN THE SUBMISSION NOT TO PROCEED AT LAW OR EQUITY.

Agreement not to sue valid in law.

1. *Effect in law of an agreement not to sue.*]—Though the courts of law agree with those of equity, that the agreement of parties cannot take away the jurisdiction of the courts, they yet assert the validity of the clause in a submission not to take any proceedings at law or equity respecting the matters referred, on the principle that a man may renounce or deprive himself of a right which the law gives him if he shall think fit (*a*); and they hold that if, contrary to this provision, a party persists in bringing an action at law or a suit in equity, an action may be brought against him for the breach of his agreement (*b*). If the proceedings, contrary to the agreement, be in the courts of law, they will be set aside by the court (*c*), but if they are in equity the party against whom they are brought, will probably be obliged to confine himself to such remedy as the court of which the submission is a rule will afford him.

Enforced by action.

By setting aside proceedings.

By attachment.

Wilfully proceeding in a suit or action contrary to the stipulation after the submission has been made a rule of a court of law, is a contempt of court, and punishable by attachment. But where there is no wilful breach, and it is doubtful whether the cause of action is included in the

(*a*) Webb v. Taylor, 1 D. & L. 676; Heath v. Brindley, 2 A. & E. 365, S. C. 4, N. & M, 235; Sherran v. Marshall, 1 D. & L. 689.

(*b*) Webb v. Taylor, 1 D. & L. 676.

(*c*) Dicas v. Jay, 6 Bing. 519; Tidd's, Pr. 529, 9th Ed.

reference, the defendant will be left to plead the award as a defence (*d*).

Discretion in enforcing it.

In some instances where the party has wilfully proceeded in Chancery, the Court of King's Bench has expressed itself very strongly on the subject, and treated such conduct as a very great contempt of court (*e*). In other instances the courts of law have intimated that there might be something of a judicial discretion exercised, whether if the party proceeded in equity they would enforce compliance by attachment (*f*).

If it is supposed that there is an intention to proceed in equity, the submission should at once be made a rule of court; for before there exists a rule of court forbidding it, filing a bill in Chancery is no contempt, though continuing the suit would be one after the submission had been made a rule of court (*g*).

Clause not to sue prohibits arrest of judgment, or judgment non obstante veredicto.

On the reference of a cause at Nisi Prius, the clause, that no action or suit shall be prosecuted by the parties against each other, precludes a motion in arrest of judgment or for judgment for the plaintiff non obstante veredicto (*h*). So also the clause prohibiting a writ of error prevents advantage being taken of a manifest error on the record, and bars the parties from moving in arrest of judgment (*i*).

Not prevent motion to set aside award.

But a clause providing, "That no action or suit at law or equity should be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the award unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the submission from moving to set the award aside for a defect apparent on the face of it, though no fraud or collusion appear, for the clause is confined to actions and suits, and does not apply to the disputing its validity on motion (*k*).

(*d*) Dicas v. Jay, 6 Bing. 519.

(*e*) R. v. Wheeler, 3 Burr. 1257; Coulson v. Graham, 2 Chitt. 57; Hilton v. Hopwood, 1 Marsh. 66.

(*f*) Nichols v. Chalie, 14 Ves. 265; Burton v. Petrie, quoted by Ld. Loughborough in Ld. Lonsdale v. Littledale, 2 Ves. Jr., 451. See Grimstone v. Bell, 4 Taunt. 253; Braddick v. Thompson, 8 East, 344.

(*g*) Hilton v. Hopwood, 1 Marsh. 66.

(*h*) Britt v. Pashley, 16 L. J., Ex. 240.

(*i*) Moore v. Butlin, 7 A. & E. 595; Chownes v. Brown, 2 D. & L. 706.

(*k*) Mackay, In re, 2 A. & E. 356.

Effect in equity of agreement not to sue, not determined.

II. *Effect in equity of an agreement not to sue.*]—A difficulty subsists between the courts of law and equity upon the effect of an agreement not to sue. The Court of Chancery generally holds, that a man cannot, by agreement to refer, deprive himself of the right to apply to a court of equity, and has considered it as extraordinary that a court of law should permit parties by contract, on a reference to arbitration, to deprive themselves of the benefit they might receive in equity. The exact effect of such a clause, however, has never been determined by the English courts of equity (*l*).

In a case in equity, much discussed and often supposed to have been overruled, the bill stated that the plaintiff and defendant were partners, and prayed a discovery of moneys paid and other partnership transactions, and relief. To this the defendant pleaded, that by the articles of partnership, if any controversy should arise between the parties they should be referred to arbitration, *and that there should not be any suit at law or in equity.* The Master of the Rolls, Lord Kenyon, allowed the plea (*m*).

Plea of sometimes allowed.

His judgment has been recently supported by a decision of Sir Edward Sugden, Lord Chancellor of Ireland, in the following case :—

Agreement not to sue distinguished from mere agreement to refer.

Two persons interested in the enclosure of the slobs or mud-banks of Lough Foyle, by deed referred it to arbitrators to make certain arrangements respecting the partition between them of the portion reclaimed from the sea. To a bill filed praying relief respecting matters within scope of the arbitration, the defendant, in his answer, relied on the provisions in the deed of submission by which, among other things, the parties covenanted not to bring or prosecute any action or suit at law or in equity touching the matters referred, or to do any act to hinder or delay the arbitrators from making their award, and he insisted that the arbitration was still pending. It was objected on the part of the plain-

(*l*) Nichols v. Roe, 3 M. & K. 431 ; Nichols v. Chalie, 14 Ves. 265.

(*m*) Halfhide v. Fenning, 2 Brown, C. C. 336.

tiff, that an agreement to refer to arbitration could not be made a defence against a right to sue.

The Lord Chancellor, however, dismissed the bill with costs, after an elaborate judgment, in which he reviewed all the important cases; a portion of which judgment is as follows: "It is no doubt clearly settled, as Lord Kenyon said, in *Thompson* v. *Charnock* (*n*), that an agreement to refer to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction. Lord Hardwicke so determined in *Wellington* v. *Mackintosh* (*o*); yet he said, 'he would not have it understood that such an agreement might not be made and pleaded, but there should be a power to examine witnesses on oath;' upon which it was observed by Lord Kenyon and Lord Eldon, that the parties could not confer such a power. Now, in the present case there is not only an agreement to refer, but arbitrators were actually named, and there is an express covenant not to sue, and an agreement to make the submission a rule of the Court of Queen's Bench of either England or Ireland: and the 3 & 4 W. IV. c. 42, England, and the 3 & 4 Vict. c. 105, Ireland, take away the right to revoke the submission without the leave of the court when the arbitrators are appointed by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of court, and give power to compel the attendance of witnesses and empower the arbitrators to administer an oath, when, as in this case, it is agreed that the witnesses shall be examined upon oath. These powers place such arbitrators on a different footing, and remove one great objection made to them both by Lord Hardwicke and Lord Eldon. In *Halfhide* v. *Fenning* (*p*), where the agreement was to refer to arbitration, and that there should not be any suit at law or in equity, Lord Kenyon allowed a plea to a bill before a reference. He held that an arbitration should be first resorted to, and if the arbitrators could not determine it, the jurisdiction would be restored. It is said that this decision has been

(*n*) 8 T. R. 139.
(*o*) 2 Atk. 569.
(*p*) 2 Brown, C. C. 336; S. C. 2 Dick. 702.

overruled even by Lord Kenyon himself. I think that the reasons for the decision are satisfactory as applied to the actual case before Lord Kenyon; and I am prepared to act upon them, unless the case has been overruled. In *Mitchell* v. *Harris* (*q*), where the agreement was simply to refer, and the bill was filed for a discovery in aid of an action, Lord Kenyon supported the bill, but in the course of the argument he distinguished the case before him from that of *Halfhide* v. *Fenning* (*r*). 'In that case,' he said, 'there was an express agreement that there should be no suit at law or in equity. Parties may so agree, and it is every day's practice that if they do they cannot proceed contrary to the agreement. In that case the covenant would be a bar: here,' he said, 'the only effect of it would be to give damages; but it could not be pleaded in bar of the action.' In giving judgment, however, he wholly lost sight of this distinction; and therefore thought *Halfhide* v. *Fenning* (*s*), contrary to the case in Atkins (*t*), and quite inconsistent with the resolution of the Court of King's Bench in Wilson (*u*), neither of which appears to me to clash with it. The report of *Mitchell* v. *Harris* in Brown (*x*), merely makes him say that it was unnecessary to discuss the case of *Halfhide* v. *Fenning* (*y*). In *Tattersall* v. *Groote* (*z*), Lord Eldon, noticing the distinction in *Halfhide* v. *Fenning* (*a*), thought he did not misconstrue the case of *Mitchell* v. *Harris* (*b*), by stating that the opinion of Lord Loughborough did not agree with the doctrine laid down in that case. In *Street* v. *Rigby* (*c*), he again seemed to doubt the authority of *Halfhide* v. *Fenning* (*d*), yet thought there would be considerable difficulty upon a negative covenant not to sue, which was the case before Lord Kenyon; and he held that a covenant to refer does not amount to an agreement to forbear to sue.

(*q*) 2 Ves. Jr. 129, a.; S. C. 4 Brown, C. C. 311.
(*r*) 2 Brown, C. C. 336.
(*s*) 2 Brown, C. C. 336.
(*t*) Wellington v. Mackintosh, 2 Atk. 569.
(*u*) Kill v. Hollister, 1 Wils. 129. Semble.
(*x*) 4 Brown, C. C. 311.
(*y*) 2 Brown, C. C. 336.
(*z*) 2 B. & P. 131.
(*a*) 2 Brown, C. C. 336.
(*b*) 2 Ves. Jr. 129, a.
(*c*) 6 Ves. 821.
(*d*) 2 Brown, C. C. 336.

In *Waters* v. *Taylor* (*e*), Lord Eldon considered the opinion expressed by Lord Kenyon wrong, as there were against it the concurrent opinions of Lord Hardwicke, Lord Thurlow, Lord Rosslyn, and Lord Kenyon himself. 'As a general proposition, therefore,' he added, 'it is true that an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration before they come into court.' But this is a point which Lord Kenyon did not decide, and I confine myself to the very point decided by him. I am not aware of any case in which Lord Kenyon doubted his own decision. Probably what fell from him in the case in Term Reports (*f*), may have been so considered, although it is confined to a simple covenant to refer. There is no report of any decision of Lord Thurlow's impeaching Lord Kenyon's. Upon the whole, therefore, I think *Halfhide* v. *Fenning* (*g*), is still law; and the objections to it have probably been occasioned by Lord Kenyon's general observations. At all events, I think that an agreement to refer, and arbitrators named, and a covenant not to sue, and a power to make the submission a rule of court, particularly having regard to the legislative provisions in such a case, do prevent a party from filing a bill with a view, as in this case, to withdraw the case from the arbitrators. It does not appear to me that, because a bill cannot be filed to have arbitrators named or to supply the place of an award, it follows that a bill can be filed before an award, in direct opposition to the plaintiff's own covenants" (*h*).

(*e*) 15 Ves. 10.

(*f*) Thompson v. Charnock, 8 T. R. 139.

(*g*) 2 Brown, C. C. 336.

(*h*) Dimsdale v. Robertson, 2 Jones & Latouche, 58.

SECTION VI.

OF SUBMISSIONS MADE IN A CAUSE AT COMMON LAW.

Submission in a cause.

I. *Forms of submissions made in a cause.*]—When there is a cause depending, a rule of court, or a judge's order, or on the trial an order of Nisi Prius, (which two latter are afterwards to be made rules of court,) will by common law be drawn up on consent of parties referring the cause, or the cause with other matters, to arbitration (*a*).

By parties on the record.

The parties to consent must be the parties on the record, even though they are mere nominal parties, for a submission by the persons really interested, without the parties on the record will not refer the cause (*b*).

Strangers may be added.

Strangers to the cause are, however, often made parties to the reference (*c*).

These modes of referring are ordinarily termed submissions by rule of court, by judge's order, or by order of Nisi Prius; but strictly speaking, the submission is the parol consent of the parties to the rule or order being drawn up, and the rule or order is but evidence of that submission (*d*). Since the 5 Geo. IV. c. 41, taking the duty off law proceedings, these forms of submissions do not require a stamp.

No stamp on submissions.

Submission by rule of court.

II. *Submission by rule of court.*]—Little need be added separately on this head at present, for the submission by judges' order and order of Nisi Prius derive their efficacy from afterwards becoming rules of court. The rule of court referring a cause to arbitration will be drawn up as of course on motion papers for that purpose signed by counsel. Such a mode of submission is often also effected on a motion for

(*a*) Lucas v. Wilson, 2 Burr, 701; Harrison v. Smith, 1 D & L. 876.
(*b*) Owen v. Hurd, 2 T. R 643.
(*c*) Hawkins v. Benton, 2 D. & L. 465.
(*d*) Carpenter v. Thornton, 3 B. & A. 52; Hide v. Petit, 1 Cas. in Chanc. 185; Skee v. Coxon, 10 B. & C. 483.

a new trial or other summary application made openly in court (*e*).

III. *Submission by judge's order.*]—A judge will grant an order referring a cause as a matter of course on a consent signed by the attorneys on both sides. This mode of submission is very commonly adopted in every stage before the cause is entered at Nisi Prius (*f*). Submission by judge's order.

A judge of assize has now, by stat. 1 G. IV. c. 55, s. 5, a like power of making orders (distinct from orders of Nisi Prius) for referring a cause at the assizes. The judge's order is sometimes by consent drawn up empowering the arbitrator to direct a verdict to be entered (*g*). By judge of assize.

IV. *Submission by order of Nisi Prius.*]—When the cause has been entered for trial, the more ordinary mode of referring it is by order of Nisi Prius on its coming on to be tried. This is an order of the Court of Nisi Prius drawn up on the consent of the parties, and embodying the terms on which they agree to refer. A verdict is generally taken by consent for a fixed amount of damages, usually for the damages laid in the declaration (*h*). The leading counsel on each side usually select the arbitrator and make a minute of his name and of the terms of the reference on their briefs, and from these the associate or clerk of Nisi Prius draws up the order. He usually makes out two duplicate orders, and delivers them to the attorneys of the plaintiff and defendant respectively on their application (*i*). Order of Nisi Prius how drawn up.

If the order is not drawn up, there is no reference under the control of the court, though a verdict has been taken by consent subject to the reference; and the ordinary powers Effect when order not drawn up.

(*e*) Archer v. Hale, 4 Bing. 464; Rigby v. Okell, 7 B. & C. 57.
(*f*) 2 Archb. Pr. 1221, 7th Ed.
(*g*) Hawkins v. Benton, 2 D. & L. 465.
(*h*) Prentice v. Reed, 1 Taunt. 151.
(*i*) Alder v. Savill, 5 Taunt. 453; 2 Archb. Pr. 1221, 7th Ed.

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of the court cannot be exercised, as, for instance, witnesses cannot be compelled to attend the arbitrator (*k*).

Verdict pursuant to certificate valid.

Yet where a verdict is taken, subject to the "certificate" of an arbitrator, the verdict entered pursuant to his certificate, made either during or after the assizes, will be as binding as a verdict of the jury, although no order of reference is drawn up, and there is only the parol submission of the parties conferring authority on the arbitrator (*l*).

Benefit of taking a verdict.

The benefit of taking a verdict is, that it facilitates the enforcing the award; for when a verdict is taken the award of the arbitrator is looked upon in law as the finding of the jury. The same consequences follow as on a verdict: costs may be taxed and execution issue for the amount awarded (*m*), which is, strictly speaking, money recovered in the action (*n*).

Verdict limit of damages in the action.

As no after amendment will be allowed (*o*), care should be taken that the verdict be entered for a sufficient amount of damages to cover all the plaintiff's claims in the action, because the arbitrator cannot in respect of those claims award a sum exceeding the amount of the damages taken. If he does, it is said his award will not entitle the plaintiff even to that amount, but will be bad altogether (*p*).

No limit to damages out of the action.

Where, however, other matters besides the cause are referred, the arbitrator does not seem so limited by the amount of the verdict as to the additional matters; and the successful party, though he cannot recover on the verdict, may yet have a remedy on the award (*q*).

Verdict security for damages in the cause only.

But although the amount of damages taken be large enough, the verdict does not stand as a security for the whole sum awarded due, but only for such sum as the arbitrator may find to be the damages recoverable in the action;

(*k*) Curtis v. Bligh, 3 Jur. 1152; S. C., B. C. M. 839.

(*l*) Tomes v. Hawkes, 10 A. & E. 39.

(*m*) Carpenter v. Thornton, 3 B. & A. 52.

(*n*) Keene v. Deeble, 3 B. & C. 491.

(*o*) Pearse v. Cameron, 1 M. & S. 675.

(*p*) Prentice v. Reed, 1 Taunt. 151; Bonner v. Charlton, 5 East, 139; Hayward v. Phillips, 6 A. & E. 119.

(*q*) Pearse v. Cameron, 1 M. & S. 675.

and if the arbitrator awards a gross sum in respect of the cause and of the other matters in difference as well, the verdict will not stand as a security for any part of the sum awarded (*r*).

Juror withdrawn or jury discharged.

Sometimes, instead of taking a verdict a juror is withdrawn on a reference being agreed to. This course does not necessarily put an end to the cause. It depends on the agreement of the parties whether the reference be in the cause, or whether the cause be terminated and the submission be of the claims between the parties but not of the cause itself (*s*). If the cause be terminated each party pays his own costs (*t*).

Real and personal actions referable by order of Nisi Prius.

Real actions, such as a quare impedit, may be referred by order of Nisi Prius (*u*). Two actions, such as cross actions between the same parties, may be referred by one order (*x*); so also a cause and all matters in difference between the parties including suits in equity, (though it is not clear whether such a reference is by common law only as to the matters out of the cause, or whether it is under the stat. 9 & 10 W. III. c. 15) (*y*). A cause and an indictment against one of the parties to the cause may be referred by one order (*z*). Even several causes between several parties, and an indictment against one of them, have been submitted to arbitration by a single order of Nisi Prius, verdicts having been taken by consent in the causes and indictment, subject to the reference (*a*). When a cause and all matters in difference have been referred by an order of Nisi Prius, it is

All matters in difference.

Indictment.

(*r*) Taylor v. Shuttleworth, 8 Dowl. 281.

(*s*) Harries v. Thomas, 2 M. & W. 32; Moscati v. Lawson, 1 H. & W. 572.

(*t*) Stodhart v. Johnson, 3 T. R. 657; Toussaint v. Hartop, 7 Taunt. 571; Archb. Pract. 285, 7th Ed.

(*u*) Grimstone v. Bell, 4 Taunt. 253.

(*x*) Howett v. Clements, 1 C. B. 128.

(*y*) Allenby v. Proudlock, 4 Dowl. 54; Lucas v. Wilson, Burr. 701; Wrightson v. Bywater, 3 M. & W. 199; S. C. 6 Dowl. 359; Harrison v. Smith, 1 D. & L. 876; Com. Dig. Arb. D. 1; Hayward v. Phillips, 6 A. & E. 119.

(*z*) Blanchard v. Lilly, 9 East, 497; R. v. Bardell, 5 A. & E. 619, S. C. sub nom.; R. v. Shillibeer, 5 Dowl. 238.

(*a*) Aldridge v. Harper, 10 Bing. 118.

improper to draw up a second order for the purpose of referring another cause between the same plaintiff and one of the same defendants (*b*)

Not issue out of Chancery.

A judge sitting at Nisi Prius has no authority to refer an issue directed out of Chancery (*c*). Nor on a trial by jury before the sheriff under the Writ of Trial Clause (*d*) has that officer any authority to permit a verdict to be taken by consent, subject to a reference of the cause. He is not in this respect like a judge at Nisi Prius, and cannot give an arbitrator power to alter the verdict of the jury (*e*).

Not cause tried before sheriff.

Reference on the "usual terms."

The reference is often agreed to be made on "the usual terms," or on the usual terms with some additional provisions applicable to the particular case. In order that parties may know to what they consent when they agree to refer on "the usual terms," and to prevent the unpleasant consequences which sometimes result from want of information on the subject (*f*), it may be advisable here to state shortly the effect of the several provisions, and to direct attention to the form of an order of reference on the usual terms set out at length in the Appendix (*g*).

In such an order it is always specially arranged whether its terms are to apply to matters in the cause only, or are to extend further. Very frequently all other matters in difference between the parties are referred with the cause. In either case, by agreeing to a reference on the usual terms the parties consent that the arbitrator shall direct, whether the verdict is to be for the plaintiff or the defendant, and if for the plaintiff, for what amount of damages, not exceeding, however, a specified amount, it is to be entered. They consent, also, that the costs of the cause shall abide the event of the arbitrator's decision in the action, but that the costs of the reference and award shall be in his discretion.

(*b*) Rees v. Waters, 16 M. & W. 263.

(*c*) Woodley v. Johnson, 1 Molloy, 394.

(*d*) 3 & 4 W. IV. c. 42, s. 18.

(*e*) Wilson v. Thorpe, 6 M. & W. 721: Harrison v. Greenwood, 15 L. J., Q. B. 92.

(*f*) Grimstone v. Bell, 4 Taunt. 253.

(*g*) See Appendix of Forms. Submissions, Form 13.

Practically, they give the arbitrator an unlimited time for making his award. The death of either party is not to abate his authority. They agree that he shall have power to amend the record, and to certify as a judge at Nisi Prius. They further agree to do whatever he may think fit to direct them to do respecting the matters referred. The evidence is to be taken on oath. The parties consent to submit themselves to be examined by the arbitrator if he shall think fit to examine them, and they agree to produce before him all documents relating to the matters that he may call for. They agree in all things to obey his award, and to bring no writ of error, action at law, or suit in equity, respecting the matters referred against the arbitrator or each other. They consent, too, that if either of them wilfully prevent the arbitrator making an award he will pay such costs to the other as the court shall think fit, and that if either party dispute the validity of the award, the court may refer the matters, or any of them, back to the arbitrator to reconsider. They, lastly, consent that the order itself may be made a rule of court.

Clause relieving from awarding on each issue.

As instances have so frequently occurred of the award being set aside as defective in consequence of the omission of the arbitrator to decide on each issue in the cause, (which is necessary for the purpose of determining the right to costs when they abide the event,) a clause, by the recommendation of the Court of Exchequer, is often inserted in orders of Nisi Prius, that it shall be sufficient for the arbitrator to find in the cause generally for the plaintiff or defendant, unless either party shall request him to decide some particular issues (*h*).

The clause for making an order of Nisi Prius a rule of court, though usually contained in such an order, is not necessary, at least when only the cause is referred, for the court has an inherent authority, independent of any consent of parties, to make an order of a judge or of the Court of Nisi Prius a rule of court (*i*).

(*h*) Morgan v. Thomas, 9 Jur. 92.

(*i*) Millington v. Claridge, 3 C. B. 609; Halden v. Glasscock, 5 B.

v. *Setting aside a submission made in a cause.*]—When a cause is referred by rule of court, judge's order, or order of Nisi Prius, although the submission removes it to a different forum, namely, that of the arbitrator, the court by common law still retains a certain jurisdiction over the submission, the proceedings in the reference, and the award. This is not analogous to its power over an ordinary judge's order drawn up by consent for payment of debt and costs. For this the court may set aside at any stage of the proceedings, whereas it will interfere with a rule or order of reference only in a certain way and according to certain rules and regulations (*j*).

Jurisdiction of the courts over the submission.

Setting it aside for fraud or mistake.

If a submission has been obtained by fraud or drawn up by mistake, the court on motion will set it aside. But it will not set aside an award on the ground of fraud or mistake in the submission (*k*). Where a third party who had agreed to join in a submission of a cause refused to proceed in the reference, the submission was set aside on the application of one of the parties on the record (*l*).

For bad faith.

So where by order of Nisi Prius a verdict was taken for the plaintiffs by consent for the penalty of a bond, the amount to be reduced according to the award of a Master in Chancery, to whom it was agreed a suit in Chancery relating to the bond should be referred by a decree of the Court of Chancery to be drawn up by consent, but owing to the plaintiffs' bad faith the decree could not be obtained; as the reference thus failed, the Court of Common Pleas set aside the order of Nisi Prius at the plaintiffs' instance, notwithstanding their bad faith, as they were mere trustees for a widow and infants; but they were compelled to pay the costs of the former trial, and of the several actions in court (*m*).

& C. 390; Hart v. Draper, 2 Marsh. 358. See Little v. Newton, 1 M. & G. 977 n. (*a*); Haggett v. Welsh, 1 Sim. 134; Allenby v. Proudlock, 4 Dowl. 54; Hayward v. Phillips, 6 A. & E. 119.

(*j*) Wade v. Simeon, 13 M. & W. 647.

(*k*) Doe d. Ld. Carlisle v. Bailiff, &c. Morpeth, 3 Taunt. 378; Sackett v. Owen, 2 Chitt, 39; Prosser v. Goringe, 3 Taunt. 425.

(*l*) Bacon v. Cresswell, 1 Hodges, 189.

(*m*) Morgan v. Miller, 6 Bing. N. C. 168.

VI. *Amending a submission made in a cause.*]—By the consent of parties a submission may be altered or amended at any time. Without that consent it is laid down that the court cannot alter it in any material part, because it cannot alter the parties' agreement. This is the rule, but there are many exceptions, as will be seen.

Submission not amendable without consent.

When a verdict is taken by consent for the damages in the declaration, subject to a reference, no alteration to increase the amount will be permitted, for possibly the smallness of this sum may have been an inducement to the other party to consent to the reference (*n*).

But the court can insert into the submission that which the parties in the legal effect of their contract assented to at the time of reference. On this principle the court amended an agreement by order of Nisi Prius that defendant should sell certain lands at a valuation by inserting the words, "that the defendant should make a good title and execute a conveyance of the premises," such being his implied contract (*o*).

Except in the furtherance of agreement.

Greater alterations, however, are sometimes permitted under peculiar circumstances. The court in one case granted a rule nisi for striking out of the order of reference the clause against filing a bill in equity, the party having before the reference intended to file a bill for a discovery to aid his defence at law, and his counsel at the trial having inadvertently allowed the clause to be inserted. The rule ultimately was made absolute by consent (*p*). In another case, of a submission by bond, where the arbitrator had made his award without hearing the defendant or his witnesses, and where there was a parol waiver of the award, it was suggested by Lord Ellenborough that on a proper case being made out by affidavit the court would discharge so much of the rule as restrained the defendant from filing a bill in equity (*q*). A rule nisi to that effect was afterwards granted, but the matter was compromised before argument.

Striking out clause not to file bill or bring error.

(*n*) Pearse v. Cameron, 1 M. & S. 675.

(*o*) Evans v. Senor, 5 Taunt. 661.

(*p*) Grimstone v. Bell, 4 Taunt. 253.

(*q*) Braddick v. Thompson, 8 East, 344.

The rule of reference in a case before the judges of Chester was ordered to be amended after an award in favour of the plaintiff, by striking out the clause restraining the parties from bringing a writ of error, on the ground of hardship and inadvertence, the defendant stating that at the time when the cause was referred, it did not occur to him that, the order of reference would contain such a clause (*r*). The case was afterwards argued in error in the Court of King's Bench (*s*).

Enlarging time by statute.

A recent statute 3 & 4 W IV. c. 42, s. 39, vests in the courts a power of enlarging the time for making the award. A subsequent portion of this work treats of the circumstances under which such enlargement will be granted (*t*).

Amending clerical error.

A clerical error, or an immaterial variance, will be amended by the courts without consent. Where the christian and surname of the defendant in the cause, Thomas James, had been transposed in the order of reference, the court rectified the error (*u*).

No amendment of material mistake of officer.

But where there is a material mistake even by the officer of the court no amendment can be permitted. Thus, in one case the court refused to allow the order to be amended according to the terms of a paper signed by the counsel at the trial, the intention of the parties from their subsequent acts appearing to have been in favour of the terms of the order (*x*). In another instance, where by a mistake of the associate the order was drawn up referring all matters in difference between the parties, and not all matters in difference in the cause only, the court said they could not interfere, that the order of reference must be treated as a mere nullity, and that the cause must go down to a new trial (*y*).

Where on the reference of a cause two orders of Nisi Prius were drawn up for the several attorneys, which were not duplicates, but varied in their terms, and the defendant after

(*r*) Fairfield v. Wright, cited in Steeple v. Bonsall, 4 A. & E. 950.
(*s*) Wright v. Fairfield, 2 B. & Ad. 727.
(*t*) See P. 11. ch. 3, s. 2, d. 3.
(*u*) Price v. James, 2 Dowl. 435.
(*x*) Pearman v. Carter, 2 Chitt. 29.
(*y*) Rawtree v. King, 5 Moore, 167.

making their part of the order a rule of court, moved to set aside the award, (the arbitrator having acted on the plaintiff's part of the order only,) and the plaintiff made a counter-motion to set aside the rule of court confirming the defendant's order as incorrect, the court directed a reference to the associate to ascertain which of the two orders was drawn up in accordance with his minutes of the agreement made at the trial, and on receiving his report that the plaintiff's was the more correct order, set aside the rule of court confirming the defendants' (*z*).

VII. *Altering terms of reference without altering submission.*]—Without touching the submission, the courts have sometimes refused, and sometimes permitted, a practical alteration of the terms of the reference.

Allowing particular of set off.

A judge's order permitting the delivery of a particular of a set-off after a reference, and so entitling the defendant to go into evidence of a set-off before the arbitrator, which, had the case been tried, the want of a particular would have entirely precluded him from giving before a jury, was set aside by the court as improperly altering the position of the parties (*a*).

Enlarging particulars of demand.

But in a more recent instance the court has claimed the power during a reference to allow an alteration in the bill of particulars as being a mere creature of the court, and not part of the record; and fresh items were permitted to be added, and so the plaintiff's capability of recovering was enlarged after the reference of an action for work and labour, even though several meetings had been held before the arbitrator, it not being suggested that the defendant desired to have the option either to decline going on with the reference, or the liberty to plead de novo (*b*).

No new plea allowed.

On one occasion where, pending a reference by order of Nisi Prius, the arbitrator certified to the court that it would

(*z*) Alder v. Savill, 5 Taunt. 453.
(*a*) Ashworth v. Heathcote, 6 Bing. 596.
(*b*) Blunt v. Cooke, 4 M. & G. 458.

be agreeable to justice to allow the plaintiff to amend his replication so as to traverse all the allegations in the plea; the court refused the application on the ground that the verdict had been taken on a particular issue by consent, and that without consent it could not alter the terms on which the reference had been made (*c*).

Plea to further maintenance of action.

But the court will allow a defendant executor who has referred the cause to avail himself of a judgment recovered against him during the reference, by permitting him to plead it in a plea puis darrein continuance, although it appears from affidavits that he has a certain amount of assets in his hands; for the granting the leave is only placing the defendant in the same situation as he would have been in, had the cause have been still pending before the Court of Nisi Prius (*d*).

Whether submission of a cause a stay of proceedings.

VIII. *Submission in a cause a stay of proceedings.*]—A submission of a cause to arbitration used in old times to be considered as an implied stay of proceedings (*e*). But as Holt, C. J., is reported, in 2 Ld. Raym. 789, to have said that in the beginning of Queen Anne's reign the judges of the Court of Queen's Bench made a rule that no reference whatever of any cause in that court should be a stay of proceedings, unless it was expressed in the rule of reference that all proceedings should be stayed, the general practice has been in all the courts of law to abide by the rule so laid down (*f*).

But in later times, Littledale, J., held an agreement to refer a cause operated as a stay of proceedings, although it was not expressed that it should so operate, as it was a breach of faith to proceed with the cause after the reference, and said that he could not find there was any such

(*c*) Cross v. Metcalfe, 5 A. & E. 800.
(*d*) Alder v. Park, 5 Dowl. 16.
(*e*) Anon. 1 Mod. 24.
(*f*) Lowes v. Kermode, 8 Taunt. 146: Tidd. Pract. 822, 9th Ed.; Green v. Pole, 6 Bing. 443.

rule of court in the reign of Queen Anne as that reported in 2 Ld. Raym. 789 (*g*).

In a recent case, Patteson, J., seemed to think that an agreement to refer a cause and all matters in difference (not containing any clause for a stay of proceedings) suspended all proceedings in the cause during the time within which the award was to be made (*h*).

Clause for staying proceedings enforced.

Whether the rule, as laid down by Holt, C. J., is to be followed or not henceforth, it is advisable, where it is intended, as is generally the case, that the proceedings at law should be stayed, that a clause expressing that intention should be inserted in the submission. When there is such a clause, any steps taken in the action after the reference will be set aside, and the party taking them will be liable to an attachment if the submission has been made a rule of court (*i*).

It seems that the application to set aside proceedings taken in the cause after the reference need not be made, until the party affected has notice, that some step has actually been taken in the cause.

Time of applying to stay proceedings.

Thus where the plaintiff had given notice that he should proceed to trial notwithstanding the reference, and obtained a verdict, no one appearing for the defence, the court held that the defendant was not bound to attend to this notice; but that the application of the defendant to set aside the proceedings made about a month afterwards, was not too late, since it was made immediately after receiving notice that the plaintiff was proceeding to tax his costs, which was the first intimation that the defendant had, that the plaintiff had actually gone on with the action (*k*).

Reference waiver of peremptory undertaking.

If a party under a peremptory undertaking to try at the next assizes fail to do so, his opponent, by agreeing subsequently to refer the cause, primâ facie waives his right to enforce the peremptory undertaking (*l*).

(*g*) Williams v. Gwynne, 2 H. & W. 312.

(*h*) Fontainemoreau v. Encontre, 4 D. & L. 425.

(*i*) Dicas v. Jay, 6 Bing. 519; Tidd's Pract. 529, 9th Ed.; Moscati v. Lawson, 1 H. & W. 572.

(*k*) Williams v. Gwynne, 2 H. & W. 312.

(*l*) Spurr v. Rayson, 5 M. & W. 339; S. C. 7 Dowl. 476.

Submission, when a discharge of bail.

IX. *Submission in a cause a discharge of bail.*]—By the reference of an action before trial, if it operates as a stay of proceedings, the bail, if there are any, are discharged from their responsibility, unless their consent to the reference has been previously obtained; for during all the time in which the suit is running its ordinary course they might surrender their principal, but when time is given, they cannot proceed against him for that time, and they are therefore deprived of the opportunity of surrendering him (*m*). But when a verdict is taken subject to a reference, or at any rate when it is respecting the quantum of damage only, the bail remain as liable, as if the cause had been regularly tried (*n*).

Discharge of replevin sureties.

When a replevin suit is referred, the consent of the sureties to the replevin bond should be obtained, or probably they would be discharged. They stand indeed in a different position from bail, who can at any time take and render their principal, while the cause is pending; for replevin sureties cannot at any time take the goods distrained upon, and restore them to the landlord. Some of the cases seem to show that they are not discharged in law though they might be in equity, by a submission of a replevin suit containing a clause for a stay of proceedings (*o*). The result of later cases seems to be this, that though a submission of a replevin suit, even though it be made by order of Nisi Prius and on a verdict taken subject to the reference, cannot be *pleaded* by the sureties as a defence to an action on the replevin bond, on the ground that the parol agreement to give time to the principal cannot in law vary their liability under seal, yet it may afford ground for relief by summary application to the equitable jurisdiction of the court of law, and may have the effect of discharging them in equity (*p*).

(*m*) Moore v. Bowmaker, 2 Marsh. 81; Hannington v. Beare, 4 Dowl. 256; Underhill v. Devereux, 2 Saund. 72, notes; Tidd. 819, 9th Ed.

(*n*) Moore v. Bowmaker, 6 Taunt, 379; Taylor v. Gregory, 2 B. & Ad. 774; Tidd. 819. 9th Ed.

(*o*) Moore v. Bowmaker, 2 Marsh. 81; S. C. 6 Taunt. 379; Moore v. Bowmaker, 7 Taunt. 96; Moore v. Bowmaker, 3 Price, 214.

(*p*) Aldridge v. Harper, 10 Bing. 118; Archer v. Hale, 4 Bing. 464; See Michael v. Myers, 6 M. & G. 702.

Where at Nisi Prius a juror was withdrawn by consent, and the cause referred, the defendant, who had been arrested at the plaintiff's suit, was not considered entitled to his discharge, the order of Nisi Prius containing no provision on the point (*q*).

Discharge of defendant.

x. *Enforcing submissions made in a cause.*]—The judge's order, or order of Nisi Prius, containing the submission, must be made a rule of court before any summary proceedings can be taken to compel obedience to the submission, when a party refuses to proceed with the reference, or comply with the terms of the submission, or when the authority of the arbitrator is to be enforced (*r*). The rule for some purposes relates back to the time of making the original order, but not for the purpose of grounding process of contempt against a party who has broken the conditions of the order before it was made a rule of court (*s*). After disobedience is a contempt of court, and will be punished by attachment (*t*).

Submission enforced by attachment.

The award made on these submissions may be enforced in several ways. When a verdict has been taken, and the award directs payment of money, judgment and execution on the verdict, or an attachment, are the ready means of enforcement. Where no verdict is entered, an attachment still will be granted; and a late statute (*u*) has given a power of levying the amount of money awarded by the process of execution. Debt will lie on the award, and an action of assumpsit may also be maintained on the promise evidenced by the rule of court (*x*); and it is clear that on an

Award: how enforced.

(*q*) Apsley v. Crosley, Barnes, 54.

(*r*) Aston v. George, 2 B. & A. 395: Fetherstone v. Cooper, 9 Ves. 67; Kirkus v. Hodgson, 3 Moore, 64; Baker v. Rye, 1 Dowl. 689; Curtis v. Bligh, 3 Jur. 1152.

(*s*) Hilton v. Hopwood, 1 Marsh. 66.

(*t*) Kene v. Fleming, 2 Keb. 22: Carpenter v. Thornton, 3 B. & A. 52; Rogers v. Dallimore, 6 Taunt. 111; Allenby v. Proudlock, 4 Dowl. 54.

(*u*) 1 & 2 Vict. c. 110, s. 18.

(*x*) Bonner v. Charlton, 5 East, 139; Tremenhere v. Tresillian, 1 Sid. 452; Carpenter v. Thornton, 3 B. & A. 52.

award other than for the payment of money, a suit for a specific performance may in many instances be maintained in equity (*y*).

SECTION VII.

OF JUDICIAL AND STATUTABLE SUBMISSIONS NOT MADE IN A CAUSE AT COMMON LAW

Submission by order of equity.

1. *Submission by order of equity.*]—In like manner as an action in the courts of law, so a suit in equity and all matters in difference may be referred by order of a court of equity, and obedience to it will be enforced by the usual process of the court for compelling obedience to its orders (*a*).

A stay of proceedings in equity.

In equity, the submission of a suit, even when made out of court, prevents a party afterwards proceeding in it. On the trial of an action in the Queen's Bench the cause and suits in equity were referred. Notwithstanding the reference, the plaintiff in one of the equity suits served a subpœna to hear judgment, and set down the cause in the registrar's book for hearing, but the Court of Equity, on motion, set aside the subpœna with costs, and struck out the causes from the list (*b*).

If after a suit has been instituted, it is agreed between the parties that the suit be dismissed on certain terms, some of which are to be settled by arbitration, though it seems this agreement cannot be pleaded to the further maintenance of the suit, in the nature of a plea puis darrein continuance, yet the whole benefit of it may be obtained on a motion to stay the proceedings in the cause (*c*).

(*y*) Walters v. Morgan, 2 Cox, 369.

(*a*) Haggett v. Welsh, 1 Sim. 134; Prior v. Hembrow, 8 M. & W. 873; Dowse v. Coxe, 3 Bing. 20.

(*b*) Ambler v. Tebbutt, 2 Beav. 442.

(*c*) Rowe v. Wood, 1 J. & W. 315; S. C. 2 Bligh, P. C. 595; Daniel's Chanc. Pract. by Headlam, 637.

When the Court of Chancery directs an issue to be tried before a jury, as the judge at Nisi Prius has no authority to refer it, if on the trial of the issue the parties agree to submit to arbitration, it seems like a reference out of court. The effect of such submission is to abandon not merely the direction to try the issue, but the whole proceedings in the suit; and the jurisdiction of the Court of Chancery is at an end just as much as if there was a consent to dismiss the bill and stay further proceedings (*d*).

Submission at Nisi Prius of issue from Chancery.

II. *Submission in bankruptcy.*]—Under the 6 G. IV. c. 16, s. 88, a submission of any dispute concerning any matter relating to a bankrupt's estate may be made to arbitrators to be chosen by the assignees and the major part in value of the creditors, who shall have proved under the commission, present at the meeting, and the party with whom they shall have such dispute (*e*).

Submission in bankruptcy.

The agreement of reference may be made a rule of the Court of Bankruptcy, "and thereupon all such rights, remedies, duties, and liabilities shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and non-performance of such award and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record" (*f*).

To be made rule of the Court of Bankruptcy.

An agreement of reference between the assignees of a bankrupt and a debtor to the bankrupt respecting a claim of the bankrupt for work and labour, was held by Parke, B., to be freed from the necessity of being stamped by s. 98 of the Bankrupt Act, (6 G. IV. c. 16,) which exempts all writings relating solely to the estate and effects of a bankrupt (*g*).

No stamp on submission.

No particular mode of submission is pointed out by the

(*d*) Woodley v. Johnson, 1 Molloy, 394.

(*e*) See Appendix of Statutes. See P. 1, Ch. 2, s. 3, d. 1.

(*f*) 1 & 2 W. IV. c. 56, s. 43. See Appendix of Statutes. As to making the submission a rule, see P. iii. Ch. 5, d.2.

(*g*) Wright v. Webb, Guildford Summer Assizes, 1846.

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statutes which permit arbitration in matters concerning Insolvents or Insolvent Petitioners.

Submission by recognizance not alterable by rule of court.

III. *Submission by record.*]—Proceedings on the Revenue side of the Court of Exchequer may sometimes give rise to a submission by matter of record. Where a person's goods are seized under an extent, a reference of all matters in difference between him and the prosecutor of the extent may be effected by a recognizance conditioned to abide the award of an arbitrator. Such a recognizance, when returned and filed as of record, cannot be altered by a rule of court, which is not matter of record. And when a rule of court is drawn up by consent changing the arbitrator, the award of the substituted arbitrator cannot be enforced by a scire facias on the recognizance, though possibly an attachment would issue on the rule of court embodying the terms of the original recognizance (*h*).

Scotch submission effect.

IV. *Submission by judicial reference in Scotland.*]—Causes before the courts of law in Scotland may be referred to arbitration by what is termed a "judicial reference," which is a reference of a peculiar, strict, and technical kind. It is stated to be an act of the court, and not to take the cause out of court, or out of the control of the court. The mode of inquiry and manner of trial alone are changed by the reference; and the forum of the arbitrator is in this restricted sense, and subject to the control of the court substituted for inquiry by the court itself (*i*).

Submission by order of a county court.

V. *Submission by order of a County Court.*]— An order of a judge of a county court may by consent of parties be obtained to refer a suit before him with or without other mat-

(*h*) R. v. Bingham, 3 Y. & J. 101. See also Carter v. Carter, 1 Vern. 259; Anon. Dyer, 242, a.

(*i*) Baillie v. Edinburgh Oil Gas Light Company, 3 C. & F. 639.

ters within the jurisdiction of the court. The submission is not revocable without leave of the judge, and the award is to be entered as the judgment in the cause (*k*).

No submission by order of sessions.

VI. *No submission by order of quarter sessions.*]—A court of quarter sessions seems to have no power to make an order referring to arbitration a matter judicially brought before it (*l*). There is indeed an instance in an old case of a reference by order of sessions on submission of the parties; but an indictment brought for not performing the award was quashed by the superior court (*m*). We have previously considered the qualified way in which a person may be appointed by a court of quarter sessions to report upon a question pending, though not absolutely to decide it (*n*).

Submission under the Lands Clauses Act.

VII. *Submissions under the Lands, Railways, and Companies Clauses Acts.*]—When the promoters of an undertaking sanctioned by Act of Parliament have given notice of their intention to take lands authorized by their special Act to be taken for the purposes of the undertaking, [s. 18], and a party interested in the lands claims more than fifty pounds compensation, [s. 22], and desires to have the amount of such compensation settled by arbitration, "The Lands Clauses Consolidation Act, 1845" (*o*), enacts that (unless the special Act provides otherwise, [s. 1], if the party "signify such desire by notice in writing to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury in respect of such lands under the provisions" contained in the general Act, "stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of compensation so claimed, the same shall be so settled accordingly" [s. 23] (*p*).

Compulsory on demand of party.

(*k*) 9 & 10 Vict. c. 95, s. 77. See the Appendix of Statutes.
(*l*) Baker v. Townshend, 7 Taunt. 422; R. v. Harding, 2 Salk. 477.
(*m*) R. v. Nichols, 2 Keb. 573.
(*n*) See ante, Ch. 1, s. 1, d. 3, p. 12.
(*o*) 8 & 9 Vict. c. 18. See the Appendix of Statutes.
(*p*) See P. 1, Ch. 1, s. 1, d. 2, p. 8.

Section 25 points out the mode of proceeding in the above and other cases as follows: "When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then unless both parties shall concur in the appointment of a single arbitrator, each party on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute shall be referred: and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other; nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award and determination of such single arbitrator shall be final." Section 26 enacts, "If before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or

Appointing arbitrators.

Appointment of arbitrator the submission.

Submission not revocable.

Party refusing to appoint.

Appointing new arbitrator on death, &c.

other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid."

Appointing umpire.

The effect of other clauses may be shortly stated. An umpire is to be appointed before the matters referred are entered upon, and he is to decide on any such matters upon which the arbitrators differ, or which shall be referred to him under the provisions of the recited Act or the special Act. [ss. 27, 28]. On the death or incapacity of a solearbitrator the matter shall be referred de novo, [s. 29]. When there are two arbitrators, if either refuse or for seven days neglect to act, the other may proceed and award alone, [s. 30]. The costs of the arbitration are to be borne by the promoters unless the arbitrators award the same or a less sum than they offered, in which case each party is to bear his own costs and half the costs of the award, [s. 34]. The submission may be made a rule of any of the superior courts on the application of either party, [s. 36] (*q*).

One arbitrator refusing to act.

Costs of reference.

Submission rule of court.

Submission under the Railways Clauses Act. Appointment of arbitrator.

Very similar provisions to the above as to the mode of settling certain disputes by arbitration are contained in "The Railways Clauses Consolidation Act, 1845" (*r*). Every appointment of an arbitrator is to be made on the part of the railway company "under the hand of the secretary or any two of the directors of the company," [s. 126].

Costs of reference.

Another difference may be noted: the costs of the arbitration, unless otherwise provided, are to be in the discretion of the arbitrators, [s. 135]. This clause, it is apprehended, does not extend to the costs of a reference respecting compensation for lands taken for constructing the railway, [s. 6], but such costs, it is presumed, will follow the rule laid down in "The Lands Clauses Consolidation Act, 1845."

Submission under the Companies' Clauses Act.

The enactments of "The Companies Clauses Consolida-

(*q*) See P. iii. ch. 5, as to making the submission a rule of court.

(*r*) 8 & 9 Vict. c. 20. See Appendix of Statutes.

tion Act, 1845" (*s*), are very similar to those of the Act last mentioned. It is necessary, however, to note these differences. It is not expressly stated that the appointment of the arbitrator is to be deemed a submission, [s. 128]. Either party has the power of appointing a fresh arbitrator in case the one he has appointed, refuses or neglects to act, [s. 129]. Except when a railway company is a party to a reference there is no provision for the appointment of an umpire in case the arbitrators cannot agree in their appointment of one, [s. 130].

Referring more than amount of compensation.

What is the effect of introducing into the appointment of the arbitrators other terms than those relating to the compensation, does not seem to have been decided. A railway company, before they obtained their act, entered into an agreement with a landowner to purchase his lands at a valuation to be determined by arbitrators, who were to determine the amount to be paid by the company for the value of the land, and for the residential and other damage. By a provision in the agreement the arbitrators were to decide upon the proper communications to be made between the lands of the party which would be severed by the intended railway, and by another provision the reference was to be subject to the provisions of the Lands Clauses and Railways Clauses Consolidation Acts. After the company got their act, each party appointed an arbitrator referring in the appointment to the agreement of purchase, and stating the subject matter of the reference to be the value of the land so agreed to be purchased and the residential and other damage. The appointments contained no provision directing the arbitrator to order communications to be made. The award made by an umpire duly appointed by the arbitrators assessed a sum for the value of the land and another sum for the residential and other damage. But it did not direct any communications to be made across the railway, so as to enable the landowner to get from his lands on one side to

(*s*) 8 & 9 Vict. c. 16, ss. 128—134. See the Appendix of Statutes.

his lands on the other side of the line. V. C. Wigram was inclined to think that under the agreement and appointment the arbitrators had power, and that it was their duty to have specified some mode of communication, but he also held the award bad as made too late. On appeal, however, the Lord Chancellor supported the validity of the award, and reversed the decision of the court below (*t*).

Submission concerning prison expenses.

VIII. *Submissions by statute, which cannot be made rules of court.*]—A submission of various disputes between parties concerning certain expenses of borough prisoners in a county gaol, more particularly enumerated in the preceding chapter (*u*), may be effected under statutes which provide that it may be lawful for either party "to apply to the justices of assize of the last preceding circuit, or of the next succeeding circuit, or to one of such justices, who shall by writing under their or his hands or hand nominate a barrister-at-law not having any interest in the question, to arbitrate between the parties" (*x*).

Appointment of arbitrator.

In one case this mode of appointment is to be adopted only in case the visiting justices of the county prison and the town council of the borough cannot agree in the appointment by writing of a barrister as arbitrator (*y*).

New appointment in case of death of arbitrator.

In case the appointed barrister die, or refuse to act, or be disabled from acting, before making his award, a new one may be appointed in like manner (*z*).

Submission between masters and workmen.

Masters and workmen, in case of disputes concerning their trade or manufacture, may by 5 G. IV. c. 96 (*a*) agree to any mode of arbitration, [s. 13]; but if there is no agree-

(*t*) Skerratt v. North Staffordshire Railway Comp., Law Times, Ap. 8, 1848.

(*u*) See P. 1, ch. 2, s. 3, d. 6, p. 47, as to the parties and subjects.

(*x*) 5 G. IV. c. 85, s. 2; 5 & 6 W. IV. c. 76, s. 114; 5 & 6 Vict. c. 98, s 20. See Appendix of Statutes.

(*y*) 5 & 6 Vict. c. 98, s. 20.

(*z*) 7 & 8 Vict. c. 93, s. 2. See Appendix of Statutes.

(*a*) See the Appendix of Statutes for this Act and the recent Acts affecting it.

ment, either party may demand a reference, and may procure a justice of the peace to name not less than four or more than six persons, one half to be master manufacturers, or agents or foremen of master manufacturers, out of whom the master engaged in the dispute is to select one as arbitrator, and the other half workmen in such manufacture, out of whom the workman engaged in the dispute is to select an arbitrator, [s. 3]. In case the arbitrators cannot agree the matter is to be decided by a justice, [s. 10]. The award is to be in the form given by the Act, [s. 22], and may be enforced by distress, and failing that by imprisonment, [s. 24]. The submission and award are exempted from stamp duty, [s. 32].

Award enforced by distress.

No stamp on submission or award.

Submission by ecclesiastical corporations and their lessees.

In case of a reference under the Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations (*b*), the submission is to be by agreement of reference or deed of submission, which, when a Bishop is a party, must be executed by the Archbishop of the province testifying his consent thereto; when a Dean is a party, by the Dean and Chapter testifying their consent thereto; when an Archdeacon, Prebendary, or other Ecclesiastical Corporation sole, by the Archbishop or Bishop of the diocese testifying his consent thereto, [s. 2]. The award, when signed and sealed, with the proper approvals and consents, is final on all parties.

Submission in case of Savings' Banks.

In the case of Savings' Banks, by the 9 G. IV. c. 92, s. 45, disputes were to be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of such institution, and the other by the party with whom the dispute arose, and if they should not agree, then such matters in dispute were to be referred in writing to the barrister appointed to certify the rules of Savings' Banks.

The recent statute, 7 & 8 Vict. c. 93, s. 14, which provides

(*b*) 2 & 3 W. IV. c. 80. See Appendix of Statutes.

that disputes shall be referred in writing to the barrister in question, seems in effect to repeal the former part of the preceding enactment as to the selection of the arbitrators. Both the submission and award are free from stamp duty (*c*).

No stamp on submission or award.

When the rules of a Friendly Society provide for the settling by arbitration of disputes between the society and its members, the stat. 10 G. IV. c. 56, s. 27, directs that a certain number of arbitrators are to be selected, out of whom, in case of a dispute, a number not less than three shall be chosen by ballot, and the award of the major part of the arbitrators so chosen shall be binding, and payment of the sum awarded may be enforced by distress and sale under a justice's warrant. In case the society refuse to settle the dispute by arbitration, or the arbitrators refuse to award, stat. 4 & 5 W. IV. c. 40, s. 7, enacts that two justices may decide the matter (*d*).

Submission in case of Friendly Societies. Who to award.

The recent enactments of the 9 & 10 Vict. c. 27, (which is to be read as part of the above-mentioned statutes,) permit a reference in writing of all disputes, for the settlement of which recourse must have been had to the superior courts, to the Registrar of Friendly Societies for England, Ireland, and Scotland respectively, and render such reference compulsory when the value of the subject in dispute does not exceed 20*l.*, unless the law officers of the crown certify that the matter ought to be decided by the judgment of a superior court, [s. 15.] The submission and award (of which a form is provided) are exempted from stamp duty, [s. 15]; payment of the amount awarded may be enforced by distress under a justice's warrant, s. 19 (*e*).

No stamp on submission or award.

In case of differences between the Postmaster General and a Railway Company respecting the carriage of the mails,

Submission between Postmaster General and Railway Company.

(*c*) See the Appendix of Statutes for the enactments; see also P. 1, ch. 2, s. 3, d. 2, p. 42.

(*d*) See the Appendix of Statutes for the enactments; see also P. 1, ch. 2, s. 3. d. 2, p. 44.

(*e*) See the Appendix of Statutes.

each party within fourteen days after notice is to appoint an arbitrator; in default of the party receiving the notice to make the appointment, the arbitrator appointed by the other party is to name a second arbitrator; the two arbitrators before entering on the inquiry are to appoint an umpire, to whom the matter is to be left for determination, if the arbitrators cannot within twenty-eight days agree in making an award. If the umpire refuse or fail to make an award within twenty-eight days after the matter shall have been referred to him, the arbitrators are to appoint a new umpire, who is to have a like period for awarding, and so toties quoties (*f*).

Submission by private Act of Parliament.

By private Act of Parliament an arbitrator is often appointed by consent of parties to determine questions between them, such as the amount of a rent charge to be paid in lieu of tithes (*g*).

SECTION VIII.

OF PROCEEDINGS ON THE SUBMISSION WHEN ONE PARTY HAS PREVENTED AN AWARD BEING MADE.

1. *Remedy by action and attachment.*]—Every submission contains some words expressing or implying the agreement of the parties to abide by and perform the award of the arbitrator.

Preventing making award, breach of submission forfeiture of bond.

Preventing the award being made is a breach of this agreement as much as not performing it when made; and when the submission is by bond, is a forfeiture of the penalty (*a*). Where there was a judgment in ejectment to re-

(*f*) Stat. 1 & 2 Vict. c. 98, s. 16, 18. See Appendix of Statutes.

(*g*) Willoughby v. Willoughby, 4 Q. B. 687.

(*a*) Baldway v. Ouston, 1 Vent. 71.

cover a mill, and the principal question in the reference was, whether the successful party should have possession of the mill or the other retain it, the former by obtaining possession of it under his judgment was held to have committed a breach of the arbitration bond, which was conditioned to stand to the award of the arbitrator respecting all matters and judgments, since the taking possession rendered it impossible for the arbitrator to decide the question submitted to him (*b*).

Punishable by attachment.

An attachment will lie, if, after the submission has been made a rule of court, a party serve the arbitrator with a subpœna out of Chancery, which hinders his making his award (*c*).

Revocation a breach of submission.

Wilfully revoking the authority of the arbitrator after the submission has been made a rule of court is also a ground for an attachment (*d*). As such revocation is a breach of the agreement to abide by the award of the arbitrator, an action will lie for the breach, whether the submission be by order of Nisi Prius or by any other form of submission, whether it be made a rule of court or not, and the expenses incurred in the reference may be recovered as damages (*e*).

Clause to give costs when award prevented wilfully.

II. *Motion for costs under the submission.*]—A more summary method, than that by action, of obtaining compensation in case of a breach of the submission is often provided by a clause "that if either party, by affected delay or otherwise, prevent the arbitrator from making his award, he shall pay to the other such costs as the court shall think fit." Previous to the statute of 3 & 4 W. IV. c. 42, s. 39, which makes the generality of submissions irrevocable, this clause was especially useful; for revoking the arbitrator's

(*b*) Green v. Taylor, Sir T. Jones, Rep. 134.

(*c*) Davila v. Almanza, 1 Salk. 73.

(*d*) Milne v. Gratrix, 7 East, 607; King v. Joseph, 5 Taunt. 452.

(*e*) Skee v. Coxon, 10 B. & C. 483; Charnley v. Winstanley, 5 East, 266. See P. 2, ch. 3, s. 3, d. 1, as to revocation.

authority was a breach of it; and if done without good cause the party revoking would be visited with the costs of the reference. When a cause was referred by a judge's order, it was held that the order might by common law be made a rule of court even after the submission had been revoked, for the purpose of applying for costs under this provision (*f*).

The applicant for costs must show to the court that the other party by wilful, wrongful, and unreasonable delay, has prevented the arbitrator from making an award. Therefore, where it appeared, that the party sought to be charged with costs had revoked the submission in consequence of being unable to procure the attendance of some material witnesses, whose attendance might have been compelled in a court of law, the court refused the application, considering that a revocation on that ground could not be considered an affected delay within the meaning of the order of reference (*g*).

As revocation is, primâ facie, a breach of the agreement, in order to free himself from liability to costs, he who revokes the arbitrator's power must satisfy the court, that he had reasonable ground for such revocation, and that he acted on that ground (*h*).

The court made the plaintiff pay the costs of the reference in the following case:—Both parties had agreed to attend the arbitrator on a particular day, but the plaintiff, though attending, not being prepared with the necessary books and witnesses, and the arbitrator declining to examine the plaintiff in support of his own case, the meeting was at the plaintiff's request adjourned. The latter refused to agree to another appointment, alleging he could not procure the books, and so the time for making the award expired without anything being done (*i*).

Without this clause the court has no jurisdiction to com-

(*f*) Aston v. George, 2 B. & A. 395; Clapham v. Higham, 1 Bing. 87, S. C. 7 Moore, 403; Smith v. Fielder, 3 M. & Sc. 853.

(*g*) Aston v. George, 2 B. & A. 395.

(*h*) Winterflood v. Stoveld, Watson on Awards, 3rd Ed., p. 43, n. (2); 2nd Ed., p. 34, n. (2).

(*i*) Morgan v. Williams, 2 Dowl. 123.

pel a party in default to pay costs, not even where there was a special provision in the order of reference that the defendants should at once during the reference repair a ship, the subject of the action, and the plaintiff had revoked the submission after the defendants had gone to expense in repairing it (*k*).

Court no power to give costs without the clause.

Where in consequence of some suspicious delay by the defendant and false excuses for non-attendance at the meetings, the arbitrator proceeded ex parte, and the award was afterwards set aside on the ground of the arbitrator's proceeding ex parte too hastily, the court refused to allow a clause, directing the defendant to pay costs under the provision against wilful delay, to be inserted in the rule for setting aside the award, and said such an application must be the subject of a separate motion, so as to give the defendant an opportunity of answering the statement made against him (*l*).

(*k*) Skee v. Coxon, 10 B. & C. 483.

(*l*) Gladwin v. Chilcote, 9 Dowl. 550.

PART THE SECOND.

The Power and Duty of the Arbitrator.

Statement of the object and contents of the second part.

To assist an arbitrator in the proper performance of his functions, by setting before him a statement of the various powers which he possesses, and of the relative duties which he has to perform, in all ordinary cases, from the time that he first takes upon himself the office of judge until the completion of all the submission requires of him by the execution of a just and unimpeachable award, is the leading object of this work, and is attempted to be effected in this part.

The subject naturally commences with a general consideration of the qualifications requisite in an arbitrator, and of the principles of decision, by which he ought to be guided. His attention is then directed to the importance of observing, over what questions the language of the particular submission, by which he is appointed, gives him jurisdiction. The duration of his authority in point of time, how it may be extended, and in what cases it may be prematurely cut short by revocation, next demands his examination.

Passing from these more general points, he will find, it is hoped, in the fourth chapter, a full practical exposition of his authority and duty in conducting the reference at every step, until the case is ripe for adjudication; and this, whether he be acting alone, or jointly with other arbitrators. The same chapter treats also of the office and duty of an umpire.

In the four following chapters the arbitrator will see laid down at considerable length, rules and principles for the framing his award; some general, applicable to the valid formation of every award; others particular, showing him, how he should award respecting a cause referred, or respecting costs; what special directions he may give, and what injunctions in certain cases he may add, regulating the enjoyment by the parties of their own property, or affecting the property of strangers.

The part concludes with a chapter concerning the personal interests and liabilities of the arbitrator.

CHAPTER I.

THE OFFICE OF ARBITRATOR.

Contents of the first chapter.

THIS first chapter treats of the office of arbitrator; section one shortly considers who are qualified to fill the situation; section two points out the moral qualities requisite in the holder of it; the third section discusses the important question, by what principles the arbitrator ought to be guided in awarding on the matters submitted to his decision.

SECTION I.

OF WHO MAY BE AN ARBITRATOR.

Any person may be an arbitrator.

An arbitrator is a person selected by the mutual consent of the parties to determine the matters in controversy between them, whether they be matters of law or fact (*a*). Neither natural nor legal disabilities hinder a person from being an arbitrator (*b*). It has indeed been laid down as law in works to which great respect is due, that idiots, luna-

(*a*) Bac. Ab. Arb. D.; West Symb. Part II, Tit. Compromise, page 164s. 21; Armstrong v. Marshall, 4 Dowl. 593.

(*b*) Vin. Ab. Arb. A. 2.

PART II. CH. I. S. 1.

tics, infants, married women, persons attainted and excommunicated, are disqualified for the office (*c*); but the better opinion is, that they may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those, whom he has himself selected (*d*).

Person interested.

The arbitrator ought to be a person who stands indifferent between the parties.

If he has any secret interest in the subject in question, or has any bad feeling towards either disputant, he is not a proper person to be a judge between them (*e*). But owing a debt to one of the parties is not such an interest, as renders a person incompetent for the office (*f*).

This objection as to interest only applies to the case of a concealed interest. For if the arbitrator has an interest in the subject of reference well known to the parties before they sign the submission, as if they refer to an owner of lands, a question respecting the mode and expense of making a drain, which will benefit the arbitrator's own estate, the award is good notwithstanding his interest (*g*). The architect or surveyor employed by a gentleman to superintend a builder in building his house is often an arbitrator between his employer and the builder (*h*), although his remuneration is a commission on the amount of the building charges. Where the parties had bound themselves in a bond to the arbitrator to abide his award, and it was argued the submission was void, because the arbitrator had an interest in making an unreasonable award to obtain the penalty, the objection was overruled (*i*).

Known interest not disqualify.

On a reference under "The Lands Clauses Consolidation Act, 1845," between a party interested in land taken by a

(*c*) Com. Dig. Arb. C.; West. Symb. Part. 2, Tit. Compromise, pages 164, 165, ss. 23, 26.

(*d*) Bac. Ab. Arb. D.; Huntig v. Ralling, 8 Dowl. 879.

(*e*) Parker v. Burroughs, Colle's Parl. Cas. 257; Earl v. Stocker, 2 Vern. 251.

(*f*) Morgan v. Morgan, I Dowl. 611.

(*g*) Johnston v. Cheape, 5 Dow. 247.

(*h*) Morgan v. Birnie, 9 Bing. 672.

(*i*) Owdy v. Gibbons, Comb. 100.

railway company and the company, the latter appointed as their arbitrator the agent they had employed to make an offer as to the price. After this the party appointed his arbitrator. The two arbitrators selected an umpire, whom, the party swore, he had, since the appointment, discovered to be a surveyor employed by the G. W. Railway Company, which was interested in the line in question. Before the reference began, the counsel for the party protested against the company's agent being an arbitrator; but the reference went on before the arbitrators and umpire together. The award was made by the umpire alone. V. C. Knight Bruce refused the party's application to set the award aside, saying, that the association of the umpire in the inquiry before the time for his acting began amounted in this case to nothing; that though the company's agent ought not to have been an arbitrator, the course taken showed that that objection was waived; and that it would be going too far to set aside the award merely in respect of the umpire's interest, although it was objectionable in point of delicacy to have appointed him, considering that his connexion with the G. W. Railway Company, as surveyor and shareholder, was known. He added, the award was saved very narrowly indeed (*k*).

Interest as surveyor and shareholder of a railway.

It has been said that a party cannot be a judge in his own cause, but if his opponent consents to his deciding the question between them, the courts will not allow an objection afterwards, though he decide it in his own favour (*l*).

Party arbitrator in his own cause.

Sometimes by statute the class from which arbitrators are to be selected for settling particular disputes is pointed out.

Arbitrators by statute.

Under the 5 G. IV. c. 96, for settling by arbitration disputes between Masters and Workmen, the referee, if the disputants can agree on one, is to be a justice of the peace, if not, there are to be two arbitrators, one a master manufacturer, or agent or foreman of a master manufacturer, the other a workman in the manufacture respecting which the dispute has arisen (*m*).

Manufacturers and workmen.

(*k*) Elliot v. South Devon Railway Company, 12 Jur. 445.

(*l*) Matthew v. Ollerton, 4 Mod. 226; S. C. Comb. 218. See Hunter v. Bennison, Hard. 43.

(*m*) S. 3.

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Barrister.

On differences arising respecting the expenses of prisoners from a borough kept in a county gaol, a barrister is to be selected as the arbitrator, as has been previously shown (*n*).

Barrister to certify rules.

Registrar of Friendly Societies.

The barrister to certify the rules of Savings Banks and the Registrar of Friendly Societies are respectively appointed by statute to decide in many cases as arbitrators (*o*).

SECTION II.

OF THE MORAL QUALITIES REQUISITE IN AN ARBITRATOR.

Arbitrator must be incorrupt.

It is hardly necessary to state, that in conducting the reference the first duty of the arbitrator is to be incorrupt and impartial. If there be any ground for imputing corruption, fraud, or partiality to him, the award cannot stand (*a*). Though the courts will rarely review the bonâ fide exercise of the arbitrator's authority, yet evidence of the merits will always be let in, so far as it may throw light upon his conduct with reference to the above imputations (*b*).

Taking money before award made.

Where the arbitrators took money of one of the parties alone for their charges without any bill delivered, and before the making of the award, Lord Hardwicke, C., thought this a sufficient reason to set the award aside, for if this were suffered it would, he said, be hard to distinguish what was corruption (*c*).

Purchasing claim in dispute.

It will not be permitted to a person chosen as an arbitrator to buy up the unascertained claims of any of the par-

(*n*) See P. 1, ch. 3, s, 7, d. 8, p. 97, as to the mode of submission.

(*o*) See P. 1, ch. 3, s. 7, d. 8, p. 98.

(*a*) Morgan v. Mather, 2 Ves. 15; Clarke v. Stocken, 2 Bing. N. C. 651; Stat. 9 & 10 W. III. c. 15; Bac. Ab. Arb. K.; Com. Dig. Arb. C.; Tittenson v. Peat, 3 Atk. 529; Earle v. Stocker, 2 Vern. 251; Burton v. Knight, 2 Vern. 514; Travers v. Ld. Stafford, 2 Ves. Sr. 19; Emery v. Wase, 5 Ves. 846; Ld. Lonsdale v. Littledale, 2 Ves. Jr. 451; Sturt v. Moggeridge, 2 Tidd. Pr. 841, 9th Ed.

(*b*) Goodman v. Sayers, 2 J. & W. 249; Anon. 2 Vern. 100.

(*c*) Shephard v. Brand, Cas. temp. Hardwicke, 53; S. C. 2 Barnardiston, 463; Bac. Ab. Arb. K.

ties to the reference; or to purchase an interest in those rights upon which he is to adjudicate. Such a proceeding would corrupt the fountain and contaminate the award (*d*).

Arbitrator must be impartial.

The arbitrator must also as much as possible keep his mind free from all personal feelings respecting the case, for if an arbitrator use any expressions towards either party, which discover a strong bias or prejudice in his mind, or show that he has been actuated by any hostile feeling, the award will be set aside, and this, even where there is nothing to impeach the conduct of the other arbitrator, who joined in making the award (*e*).

Private bonâ fide agreement.

Any private agreement between the arbitrator and a party respecting the subject of reference, intended to be considered in the award, is objectionable, though perfectly bonâ fide; as, for instance, if the question be respecting the amount of rent a tenant is to pay, the arbitrator should not in making his valuation take into account an agreement with himself by the tenant to lay out a large sum upon the premises, of which agreement the landlord has no power to enforce performance (*f*).

Imposing terms on party.

Commissioners appointed by statute to ascertain by their award the bounds of the respective mines in a certain district, and to fix the rent payable to the crown by the several miners who work them, are not justified in imposing on a miner the condition, that he shall pay up to the crown arrears due for past workings of his mine, before they give him the benefit of the Act of Parliament by inserting his name and portion of mine in their award (*g*).

(*d*) Blennerhasset v. Day, 2 Ball & Beatty, 104.

(*e*) Burton v. Knight, 2 Vern. 515; S. C. Bac. Ab. Arb. K. Parker v. Burroughs, Colles Parl. Cas. 257; Ward's case, cited 2 Atk. 155, 396; Chicot v. Lequesne, 2 Ves. Sr. 315.

(*f*) Chichester v. M'Intire, 1 Dow. N. S. 460.

(*g*) Attorney Gen. v. Jackson, 5 Hare, 355.

SECTION III.

OF THE PRINCIPLES BY WHICH THE ARBITRATOR SHOULD BE GUIDED.

Characters filled by arbitrator.

In order for an arbitrator to ascertain what are his powers and duties, he must look in each case to the submission which confers the one, and imposes the other, and gather therefrom the intention of the parties (*a*). For the characters which arbitrators have to sustain vary materially according to the effect of the respective submissions.

Judge of law and fact.

Jury.

Judge of Nisi Prius.

Court in Bank.

An arbitrator is generally the final judge of law and fact (*b*). On the reference of an action at the trial, he usually stands in the place of the Jury, and his award is looked upon as their verdict (*c*); at times he is clothed with many of the powers of a Judge at Nisi Prius (*d*); occasionally some of the functions of the Court in Bank devolve upon him (*e*).

Master in Chancery.

Lord Chancellor.

Attorney General.

With respect to matters in Chancery, sometimes he represents only a Master of that court, and his award is open to revision as a master's report (*f*); at other times his decision is looked upon as that of the Chancellor himself (*g*); under special circumstances he is vested with the powers of the Attorney-general as to informations in charity cases (*h*).

Dictator.

He is often also a sort of dictator armed with powers beyond those of any court of justice to control the future con-

(*a*) Samways v. Eldaley, 2 Mod. 73; Winter v. White, 1 B. & B. 350, 357.

(*b*) Morgan v. Mather, 2 Ves. 17; Dick v. Milligan, 2 Ves. 23; Armstrong v. Marshall, 4 Dowl. 593; Perriman v. Steggall, 9 Bing. 679; Angus v. Retford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735.

(*c*) Angus v. Retford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735; Lee v. Lingard, 1 East, 400; 1 Borrowdale v. Hitchener, 3 B. & P. 244; Bury v. Dunn, 1 D. & L. 141.

(*d*) Caila v. Elgood, 2 D. & R. 193.

(*e*) Allen v. Lowe, 4 Q. B. 66.

(*f*) Knox v. Symmonds, 1 Ves. Jr. 369.

(*g*) Pitcher v. Rigby, 9 Price, 79.

(*h*) Prior v. Hembrow, 8 M. & W. 873.

duct of parties, and to regulate their enjoyment of their property (*i*).

Principles of decision generally.

A very important question here presents itself for solution. According to what principles is the arbitrator to act? What control ought the rules of the courts to have over his decision? The following proposition (which, however, only gives a partial answer) is hazarded as the safest general rule that can be drawn from a consideration of the cases,—that an arbitrator should endeavour to arrive at his conclusions upon the same rules and principles which would have actuated the tribunal or tribunals for which he is substituted in coming to a decision.

Thus, on a reference at Nisi Prius, where the arbitrator stands very much in the place of a jury, he should, it is presumed, ordinarily decide the cause upon the same principles which a judge at Nisi Prius would have laid down for the guidance of the jury. And yet in one instance, where the verdict in a cause had depended on the result of the award, Lord Kenyon, without expressing any disapprobation, suggested that possibly, in arriving at his conclusions as to the verdict, the arbitrator had proceeded to cut the knot, rather than unloose it according to the strict rules of law, from a wish to do complete justice between the parties (*k*).

When all matters referred.

The various statements of judges respecting the principles of decision by which an arbitrator should be guided, especially on a reference "of all matters in difference," it is not quite easy to reconcile. But disregarding special exceptions, there is abundant authority for laying down a general rule that an arbitrator, like every other judge, is bound by the rules of law (*l*), and that it is beyond his authority to award anything contrary to law; for the ordinary presumption is, that the parties intend to submit to him only the legal consequences of their transactions and en-

Power according to law.

(*i*) Wood v. Griffith, 1 Swanst. 43; Boodle v. Davies, 3 A. & E. 200.

(*k*) Habershon v. Troby, 3 Esp. 38.

(*l*) Aubert v. Maze, 2 B. & P. 375; Badger, In re, 2 B. & A. 691.

gagements (*m*); so that when parties refer their *legal* rights to arbitration the arbitrator must endeavour to award according to law: although a mere mistake in law, as we shall see hereafter, is rarely fatal to the award (*n*).

Legal and equitable authority.

The word "legal" is here used in an enlarged sense, for an arbitrator on a general reference should take into his consideration the rights of the parties in equity as well as at common law (*o*).

Reforming a deed.

In a recent case, on a reference between two partners, it being contended that the deed of partnership had been erroneously drawn up, the arbitrator allowed the draft of the deed to be put in evidence to show the mistake, and pronounced the deed to be wrong, and decided between the parties, on the construction of the deed, according to what he thought the deed intended to have been; on its being objected that he had exceeded his authority in so doing, Parke, B., said, "All disputes respecting the interests of the parties were referred to the arbitrator; he consequently had power to decide all questions of law and equity; therefore, if it was a question in dispute before him whether the deed was drawn up in mistake, and he thought it was, he had power to reform it under his equitable authority, but if he had been called upon only to decide upon the construction of the deed, of course he could not have altered it" (*p*).

Arbitrator not bound by rule of practice.

The arbitrator is not fettered by the mere rules of practice which the courts of law and equity have adopted for general convenience. Thus, he may allow interest in taking an account between the parties, when a known rule of practice would have prevented the courts from allowing it; for the authority to adjust the account between the parties carries with it an implied authority to allow interest, unless expressly excluded by the terms of the submission (*q*).

Moral considerations.

It has been said by judges of great celebrity that under a

(*m*) Badger, In re, 2 B. & A. 691; Morgan v. Mather, 2 Ves. Jr. 15; Young v. Walter, 9 Ves. 364.

(*n*) Blennerhasset v. Day, 2 Ball & Beatty, 104. See P. 2, ch. 5, s. 8, p. 295, as to a mistake in law.

(*o*) Delver v. Barnes, 1 Taunt. 48; Craven v. Craven, 7 Taunt. 642.

(*p*) Keene & Atkinson, In re, Exch., Ap. 16, 1847.

(*q*) Badger, In re, 2 B. & A. 691.

general reference of all matters in difference the arbitrator is not confined within the rules of law and equity, that he has greater latitude than the courts of law in order to do complete justice between the parties, and that he may take all moral questions into consideration in forming his judgment; for instance, that he may relieve against a right which lies hard upon one party, but which having been acquired legally and without fraud, cannot be resisted in a court of justice (*r*).

In one instance the Court of Queen's Bench is said to have laid down the following rule, "that when arbitrators, knowing what the law is, or laying it entirely out of their consideration, make what they conceive, under all circumstances, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law (*s*).

Power beyond law intended.

But these and similar general observations must in general at least, it is humbly suggested, be considered and explained by reference to the matters in dispute in the particular case, showing the intention of the parties to give the arbitrator power beyond law. Thus in the case which gave rise to the expression of the above rule (*t*), the arbitrators to whom the differences respecting a testator's estate had been referred, awarded that they were of opinion that the intention of the testator was by his will to have disposed of his property in a particular manner which they specified, and with which they directed the parties to be satisfied (*u*). This distribution was clearly contrary to that which the law and legal construction of the will would have effected. The court, however, sustained the award, though the arbitrators stated on affidavit, that in disposing of the residue not in-

(*r*) South Sea Company v. Bumstead, 2 Cas. in Eq. Ab. 80; Knox v. Symonds, 1 Ves. Jr. 369; Delver v. Barnes, 1 Taunt. 48; Young v. Walter, 9 Ves. 364; Hanson v. Liversedge, 2 Vent. 242; West. Symb. Part II. title Compromise, s. 21.

(*s*) Ainsley v. Goff, B. R. 1799; Kyd on Awards, 351.

(*t*) Ainsley v. Goff, Kyd on Awards, 351.

(*u*) In Kyd on Awards the form of the submission is given in the Appendix, p. 424; and of the award in the Appendix, p. 427.

cluded in the will they did not conceive that they were making any distribution of it according to any fixed rules of law upon the subject, but that they were dealing out to the several parties interested, what appeared to them to be according to the best of their judgment, under all the circumstances of the case, strict and impartial justice, agreeably to what they believed to have been the intention of the testator. From the terms of the award, the statement of the arbitrators, and the mention made in the report that the arbitrators were gentlemen who were well acquainted with the intentions of the deceased, it may probably be inferred that the question in difference was, not what was the legal effect of the will and the legal rights of the parties to the property, but what was the distribution of his estate which the testator intended by his will to have made. If this view be correct, the arbitrators, by the very nature of the matters in difference, were called upon by the parties to decide irrespectively of their legal rights, and thus in one sense authorized to award against law, or rather beyond law (*x*).

A dictum, however, of Wilde, C. J., in a recent case, that the courts will not set aside an award for a mistake in law of the arbitrator, unless they can on the face of the award distinctly see that the arbitrator, *professing and intending to decide in accordance with law*, has unintentionally and mistakenly decided contrary to it, may be quoted to assist the argument, that if the arbitrator avowedly threw the law overboard, his decision, notwithstanding, might be supported (*y*).

(*x*) Delver v. Barnes, 1 Taunt. 52, n. (a).

(*y*) Fuller v. Fenwick, 3 C. B. 705.

CHAPTER II.

OVER WHAT MATTERS THE SUBMISSION GIVES THE ARBITRATOR JURISDICTION.

Scope and contents of the second chapter

THIS chapter examines over what particular matters the arbitrator acquires a jurisdiction. The first section discusses the effect of particular words and phrases used in the submission as enumerating the matters referred. Section two considers, how far, when there are more than one person on each side, a matter, to be accounted a matter in difference, must be one, in which all are jointly interested. Section three points out the limit as to time, which divides the matters in difference existing previous to it, and on which the arbitrator has to award, from matters in difference arising subsequently, upon which he may not adjudicate.

SECTION I.

OF THE EFFECT OF PARTICULAR TERMS TO REFER PARTICULAR MATTERS.

The question, over what subject matters the arbitrator is to exercise his powers, must be answered by a reference to

the particular words of the submission enumerating the subject matters. The most general and comprehensive form of words is that which refers to the arbitrator's decision "all matters in difference between the parties." The arbitrator, on such a submission, may consider all questions affecting the parties' civil rights (*a*); he may adjudicate on a demand made by one of them in auter droit as executor or administrator (*b*); or on differences relating to things which a party has in right of his wife (*c*). Though a claim made by one side before the arbitrator is admitted by the other to be correct, it is still a matter in difference within the meaning of such a submission, and ought to be considered in the award (*d*); but a claim within scope of a former reference in which the arbitrator has directed mutual releases to be executed, is not a matter in difference on a subsequent reference, although it was not in fact considered or awarded on by the former arbitrator (*e*). A claim made and abandoned before the arbitrator is not a matter in difference (*f*).

All matters in difference.

Demand in auter droit.

Demand admitted.

Within former submission.

Claim abandoned.

A reference of "all suits, controversies, and demands," extends to a liability for a debt due from the wife of one of the parties as executrix (*g*). On a submission "to end all controversies," it was held that an indictment for a battery was not a controversy between the parties within the meaning of the submission, since it was a proceeding at the suit of the King (*h*).

All suits, controversies, and demands.

A submission of "all debts, trespasses, and injuries," includes all demands, all manner of wrongs, all matters of equity and of law (*i*); of "all debts," comprizes specialties and judgments (*k*); and of "all demands due and owing,"

All debts, trespasses, and injuries.

All demands due and owing.

(*a*) Baker v. Townsend, 7 Taunt. 422.

(*b*) Elletson v. Cummins, 2 Stra. 1144; S. C. Com. Dig. Arb. D. 4.

(*c*) Bac. Ab. Arb. E. 1; Berry v. Perry, 3 Bulst. 65.

(*d*) Robson & Railston, In re, 1 B. & Ad. 723. See P. 2, ch. 5, s. 4, d. 2, as to awarding on all matters in difference.

(*e*) Trimingham v. Trimingham, 4 N. & M. 786.

(*f*) Bird v. Cooper, 4 Dowl. 148. See P. 2, ch. 5, s. 4, d. 2.

(*g*) Lumley v. Hutton, Cro. Jac. 447; 1 Rolle Rep. 268.

(*h*) Horton v. Benson, Freem. 204.

(*i*) Cable v. Rogers, 3 Bulst. 311.

(*k*) Roberts v. Marriett, 2 Saund. 190; Com. Dig. Arb. D. 4.

embraces everything one party has a right to exact of the other at the time of the submission, and is not limited by the "words due and owing" to a debt or other special demand which is more strictly speaking a duty, but may extend to a right of entry into land, or a suit for partition (*l*). By a submission "of all actions," causes of action are not referred (*m*), but by a submission "of all actions and complaints" they are (*n*). Actions real are included in a reference "of actions personal ac sectis et querelis (*o*), but not if the word ac is omitted, for then the word personal will limit the whole (*p*).

All actions and complaints.

A slight variation in the collocation of the words of a submission will sometimes make a most important difference in the powers of the arbitrator. Thus, if besides an action pending, there are cross demands and other differences of various kinds, and it is intended to empower the arbitrator to settle them all, the submission is often expressed to be "of all matters in difference between the parties in the cause;" but if it is proposed to authorise him to dispose of nothing but the questions in the action, the submission very frequently purports to be "of all matters in difference in the cause between the parties" (*q*). As the distinction between the two phrases is rather too refined for the ordinary apprehension of unprofessional arbitrators, it has been suggested that to prevent error, when a general reference is intended the words should be "of all matters in difference between the parties;" but when the reference is to be limited to the action, "of all matters in difference in the cause" (*r*).

"Cause and all questions" in Scotland.

In the Scotch courts it is curious to observe that by a technical construction put upon the words, a judicial reference "*of a cause and all questions*," is a reference only of all matters in dispute in the cause (*s*).

(*l*) Knight v. Burton, 6 Mod. 231; Com. Dig. Arb. D. 4.

(*m*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. c. 1, p. 245.

(*n*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. c. 2, p. 245.

(*o*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. D. 7, p. 246.

(*p*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. D. 6, p. 246.

(*q*) Malcolm v. Fullarton, 2 T. R. 645.

(*r*) Smith v. Muller, 3 T. R. 624.

(*s*) Baillie v. Edinburgh Oil Gas Company, 3 C. & F. 639.

"Cause," or "all matters in the cause."

A reference "of a cause," and "of all matters in difference in a cause," means exactly the same thing, and only gives the arbitrator power to decide on the questions raised by the pleadings which are necessary for the determination of the cause (*t*).

By the reference of a cause at Nisi Prius the cause, as it stands, is referred, and the arbitrator is entitled to decide on the same claims and defences alone, which the jury would have done, had it been decided by them at the time of trial (*u*). He has no power to settle any other matters in difference between the parties than those in respect of which the plaintiff can recover in the cause (*x*).

Whether issues of law referred.

It does not seem clear, when a *cause only* is referred *at Nisi Prius*, whether the arbitrator ought to decide the issues of law as well as of fact, as, for instance, a demurrer in the cause pending before the court, or whether his functions should be confined to those of a jury in determining the questions of fact.

Demurrer.

In one instance, where some of the pleas had been demurred to, and the cause was referred on the trial of the issues in fact, a verdict being taken subject to the reference, and the arbitrator awarded a verdict for the defendant, an objection was made to the award that the arbitrator had not assessed contingent damages on the demurrer, but it never was suggested that it fell within his duty to dispose of the demurrer itself, and the demurrer was subsequently argued before the court (*y*).

Judgment non obstante veredicto.

In another case, however, of a reference of a cause only at Nisi Prius, where the arbitrator found in the defendant's favour a plea going to the whole cause of action, and therefore awarded no damages to the plaintiff, the plea being immaterial, the court said the arbitrator ought to have given damages to the plaintiff notwithstanding the plea, and thus held it to be his duty to have decided practically the issue

(*t*) Wild v. Holt, 9 M. & W. 161; Angus v. Retford, 11 M. & W. 69; Dresser v. Stansfield, 14 M. & W. 822; Hobson v. Stewart, 4 D. & L. 589.

(*u*) Ashworth v. Heathcote, 6 Bing. 596.

(*x*) Atkinson v. Jones, 1 D. & L. 225.

(*y*) Cooper v. Langdon, 9 M. & W. 60.

in law whether the plaintiff was entitled to judgment non obstante veredicto (*y*).

But the Court of Common Pleas have recently held that the question of the plaintiff's right to judgment non obstante veredicto is not a matter in difference in the cause at the time of the reference at Nisi Prius, and therefore not determinable by the arbitrator (*z*).

When cause and all matters referred.

When matters *beyond the cause* are referred with the cause, even at Nisi Prius, it would seem an arbitrator should decide a demurrer, for the submission manifestly contemplates his possessing more extended powers than the jury(*a*). At any rate, when the *cause and all matters in difference* are referred, *not on the trial*, but at some other stage, as for instance by a judge's order before trial, the power and duty of the arbitrator to determine a demurrer is quite settled (*b*).

As further illustrating the effect of a general reference of all matters in difference, the attention of the reader is directed to those portions of this work, which consider the effect when a matter apparently within scope of the submission is not treated as a matter in difference by the parties, or brought before the consideration of the arbitrator (*c*).

Wool in process of woolling, &c.

Under a submission to arbitration, which referred the amount of compensation for a loss by fire in respect of "wool in the process of woolling, carding, scribbling, and spinning," but which in other parts spoke of "raw" wool, the arbitrator was held to have acted rightly in refusing to take into his consideration as a subject for which compensation could be given, a quantity of wool on the premises, which had undergone a part of the process of manufacture, but was not at the time of the fire in any of the engines (*d*).

(*y*) Grenfell v. Edgcome, 7 Q. B. 661. See Steeple v. Bonsall, 4 A. & E. 950; Britt v. Pashley, 16 L. J., Ex. 233; S. C. 1 Ex. R. 64. See P. 2, ch. 6, s. 5, d. 2, p. 363, as to the arbitrator's duty to decide on the plaintiff's right to judgment non obstante veredicto.

(*z*) Toby v. Lovibond, 17 L. J. C. P. 201; S. C. 12 Jur. 436.

(*a*) Allen v. Lowe, 4 Q. B. 66; Wynne v. Wynne, 4 M. & G. 253.

(*b*) Mathew v. Davis, 1 Dowl. N. S. 679; Doe d. Simpson v. Emmerson, Law Times, 5 June, 1847.

(*c*) See P. 2, ch. 5, s. 4, d. 1, p. 251; P. 3, ch. 1, d. 3, p. 457.

(*d*) Hurst, In re, 1 H. & W. 275.

Money laid out on request.

On a submission respecting monies laid out by the plaintiff for a woman at her request before her marriage, an award directing the defendant, her husband, to pay a certain sum for monies laid out by the plaintiff for his wife before her marriage, was held bad as not being limited to what was laid out *at her request* (*e*).

Effect of recital.

Where the submission recited that the plaintiffs claimed a certain specified balance, and then referred all disputes and differences between the parties to an arbitrator, who was "to determine the account between the said parties," the court held that the arbitrator's authority was general, extending to all matters in dispute, and was not limited to the matters included in the recited balance, and that the recital merely indicated the motive of the submission, but did not limit his power (*f*).

Respecting settled account.

But where the submission, after reciting that a certain amount of profits had been made on a farm by trustees, referred to an arbitrator, among other things, the trustees' accounts of the profits of the farm and farming business carried on by them, so far, and so far only, as the said profits and produce had not been already ascertained; the arbitrator was held by the Master of the Rolls to have no power to open the settled account as to the profits of the farm, and disallow a portion of it (*g*).

Suit recited not referred.

A submission between two partners, after reciting that disputes had arisen between them, and that a bill had been filed in Chancery for a dissolution of the partnership, stated, that in order to put an end to the suit they agreed to refer all matters in dispute arising out of the partnership accounts or otherwise, to certain arbitrators, who were also empowered to decide on the proportions each should pay of the costs of the reference and the costs of the bill in Chancery. The court held that the arbitrators were not bound to award in respect of the Chancery suit, or to take any notice of it except to apportion the costs of it (*h*).

(*e*) Waters v. Bridge, Cro. Jac. 639.

(*f*) Charleton v. Spencer, 3 Q. B. 693.

(*g*) Skipworth v. Skipworth, 9 Beav. 135.

(*h*) Marsh, In re, 16 L. J., Q. B. 330.

SECTION II.

OF THE SUBJECT MATTER, WHETHER JOINT OR SEVERAL.

All suits "between them two."

If A. and B. submit "all suits and actions depending between them two," the arbitrator has no power to make an award respecting an action between B. and his wife on one side as plaintiffs or defendants, and A. on the other (*a*); nor, on a general reference between the plaintiff and defendant, can he make the defendant pay to the plaintiff a compensation for the taking of property, in which the plaintiff and others are jointly interested (*b*).

Between A. and B. of the one part and C. of the other.

Whether joint or several.

But a submission by A. and B. of the one part, and C. of the other, "of all matters in difference between them," it is often said, authorizes the arbitrator to decide on all matters that either of the two has against the third jointly or severally, such as an action by A. alone against C., on the ground that the words are to be taken distributively (*c*).

In some cases, however, a different construction has been adopted (*d*). And in a more modern instance, where the arbitrator refused to receive evidence respecting separate injuries alleged to have been sustained by each of two defendants, Gibbs, C. J. supported the award, and held the arbitrator justified in refusing to consider any but a damage sustained by both jointly (*e*).

On a recent occasion of a reference by order of Nisi Prius of a cause and all matters in difference between a single plaintiff and three defendants, the question was raised as to

(*a*) Brocas v. Savage, Rolle Ab. Arb. D. 4; Com. Dig. Arb, D. 4; Morse v. Sury, 8 Mod. 212.

(*b*) Fisher v. Pimbley, 11 East, 188.

(*c*) Arnold v. Pole, Rolle, Ab. Arb. D. 5; Libtrat v. Field, 1 Keb. 885; Athelston v. Moon, Com. Rep. 547; Carter v. Carter, 1 Vern. 259; Thomlinson v. Arriskin, Com. Rep. 328; Bac. Ab. Arb. E.; Com. Dig. Arb. D. 4.

(*d*) Bean v. Newbury, 1 Lev. 139.

(*e*) Garland v. Noble, 1 Moore, 187.

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whether a separate action of replevin by the same plaintiff against one only of the three defendants was a matter in difference within the submission: Pollock, C. B., expressed an opinion that it was not, and sought to draw a distinction between a reference by private agreement, and a reference by order of Nisi Prius, adding, that in the latter class of submissions, whenever it is intended that the arbitrator shall adjudicate on a matter not affecting all the parties, the words "all matters in difference between the parties," are always followed by the words, "or any or either of them." Parke, B., however, denied the distinction between a submission by act of court and by agreement of the parties, and both he and Alderson, B., were inclined to think that the action of replevin was a matter in difference, on which the arbitrator should have adjudicated in the award then under consideration; and this, although the latter action had been referred to the same arbitrator at the same time with the former action, but by a separate order of reference, and he had already made a separate award respecting it. There was, however, no decision on the point, for all the court agreed in holding the award in question good, on the ground that the parties had waived the objection, if any, as their conduct showed that they meant the action of replevin to be disposed of by the other award (*f*).

Adverse rights of defendants in equity.

It has been decided in Chancery that on a reference of all matters in difference between the parties to a chancery suit to enforce a claim against the real and personal estate of a testator, where the executor and parties interested in the real estate are defendants, the arbitrators should not only adjudicate between the plaintiffs on one side and defendants on the other, but decide respecting the claims of the co-defendants as against each other, and adjust the individual rights of each (*g*).

If the submission between A. and B. on the one part, and

(*f*) Rees v. Waters, 16 M. & W. 263.

(*g*) Turner v. Turner, 3 Russ. 494.

All matters between the parties "or any of them."

C. and D. on the other, be "of all matters in difference between them, *or any of them*," it is clear the arbitrator may consider a claim by A. and B. against C. only (*h*).

The following case would seem to show that the arbitrator might award on a separate matter between A. and B.

Six partners by two bonds submitted to arbitration all matters relating to their trade. By the one bond, three of them became jointly and severally bound to the other three to obey the award as to all matters between the partners *or any of them;* by the second bond, the latter three became bound to the former three in like manner. The court, with the exception of Richardson, J., held that the arbitrator was authorised to award on a matter in dispute between two co-obligors only, on the ground that the reference was of all matters between them *or any of them*. That learned judge, however, expressing his opinion that the arbitrator could not decide on a question between two parties to the same bond, made use of the following words: "The authority which seems to me to come nearest to the present case is in Brooke's Abridgment, tit. Arbitrament, pl. 4. There, after citing the Year Book, 2 R. iii. 18, (where it was held by three justices in the Exchequer Chamber, that if J. N. and three others put in award of W. P., all actions and demands between them, the arbitrator has authority to decide all joint matters between them, and all several matters also,) he adds, 'Yet it seems clear that the arbitrator has not authority to determine or arbitrate matters between the three, for they are one party against the fourth, but he may determine between any one of the three and the fourth.' This distinction appears to me founded in reason and principle" (*i*).

(*h*) Joyce v. Haines, Hard. 399. (*i*) Winter v. White. 1 B. B. 350.

SECTION III.

UP TO WHAT DATE MATTERS IN DIFFERENCE MAY ARISE.

PART II. CH. II. S. 3.

It is an important question for an arbitrator to consider, what is the limit as to time, within which a matter in difference arising is properly within his jurisdiction.

No claim in cause arising after writ.

When the matters in difference in a cause only are referred, as the arbitrator can decide upon nothing but what the plaintiff could recover in the action, it follows that he is not justified in receiving evidence of a claim arising after the date of the writ (*a*).

By special provisions claim after writ.

But special provisions in the submission often carry down his jurisdiction to matters subsequent to the commencement of the action. Sometimes the power is expressly given; sometimes indeed it is rather to be inferred from the terms of the submission.

Matters relating to annuity in the cause.

In an action of replevin for a distress, taken by virtue of a rent-charge or annuity charged on land, a reference "of the cause, and all matters relating to the annuity in question in the cause," was held to include more than the cause itself, and to justify the arbitrator in directing payment of the arrears of the annuity accruing in the interval between the commencement of the action and the date of the order of reference (*b*).

Indictment clause for compensation.

On the reference of an indictment for a conspiracy, the arbitrator was to be at liberty to receive evidence touching any compensation to be awarded to the prosecutor. Evidence of loss accruing to the prosecutor between the time of filing the indictment and the trial (a period of nine months) was offered, but rejected by the arbitrator. The award stated that the arbitrator had not taken into account any compensation for damages accruing between the filing the indict-

(*a*) Atkinson v. Jones, 1 D. & L. 225; Ashworth v. Heathcote, 6 Bing. 596.

(*b*) Wynne v. Wynne, 4 M. & G. 253.

ment and the trial. On a motion to set aside the award, or to refer it back, Lord Denman, C.J. said the arbitrator was wrong, if he thought himself precluded from inquiry into a loss arising from the old conspiracy, though after the filing the indictment, but right, if he merely excluded evidence of damage from a new conspiracy, and as the award was ambiguous, he directed an inquiry to be made of the arbitrator, as to the principle on which he had acted in rejecting the evidence (*c*).

All matters in difference means to the time of the reference.

A reference of all matters in difference gives an arbitrator power over all matters down to the period of the submission, but does not, except under very special circumstances, enable him to award on future and contingent claims, or to give damages in respect of money demands becoming due after the date of the submission, though pursuant to an agreement made previous to it, or indeed respecting any subjects of dispute arising after the reference (*d*).

If the submission be of all differences and "of anything in any wise relating thereto," these latter words do not extend the power of the arbitrators to matters which, though relating to the existing differences, arise after the date of the submission; nor do they authorize the calculation and awarding of interest subsequent to that date (*e*).

Re-executing submission.

Where arbitration bonds, dated the 9th of December, were on the 4th of January, before the proceedings had commenced, altered by the parties substituting a later day as the limit for making the award, and were then re-executed and re-delivered, the arbitrator was held to have cognizance of claims arising after the 9th of December, and up to the 4th of January, since the execution of the bonds not only extended the time, but amounted to a new submission on the 4th of January (*f*).

(*c*) R. v. Brewer, Q. B., June 11, 1845.

(*d*) Brown v. Croydon Canal Company In re, 9 A. & E. 522: Cockburn v. Newton, 2 M. & G. 899; Manser v. Heaver, 3 B. & Ad. 295; Harding v. Forshaw, 1 M. & W. 415.

(*e*) Morphett In re, 2 D. & L. 967.

(*f*) Watkins v. Phillpotts, M'Lel. & Y. 393.

Ewes with lamb.

It is said if the submission be respecting ewes with lamb, and the ewes, after the submission, but before the award, have lambs, that the arbitrator has no power to make any award touching the lambs (*g*).

Parties may submit future claims.

The parties however may, if they please, give the arbitrator power to determine on contingent claims, or on matters in dispute or demands arising after the date of the submission (*h*), and such a course is often pursued.

Leaving to the arbitrator to decide as to the costs of the reference and award, all of which necessarily accrue after the date of the submission, is a familiar instance (*i*).

Money not due till after reference.

A reference "of all matters in difference, including the claim of the defendant in her set off in the action," was construed to authorize the arbitrator to award to the defendant a sum which was not pleadable as a set-off strictly, since by agreement it was not due when the action commenced, nor till after the date of the reference (*k*).

Periodical award of damages.

When an arbitrator was appointed so that he made his award as to existing damages before a certain day, and as to damages which should be thereafter sustained from the working of a certain mine, at the expiration of every two months from the day specified, the arbitrator was held empowered to make, at the end of each two months, a periodical assessment of the damages accruing during the respective intervals, but not, after delaying till a third month, to include in one award a compensation for damages incurred subsequent to the second month, as well as for damages occurring during the two months (*l*).

Money not due at date of award.

From what has been said already, it must be evident that claims not due at the date of the award cannot, under ordinary circumstances, be properly adjudicated on. An award

(*g*) West's Symbol. Part II. Tit. Compromise, s 33.

(*h*) Brown v. Croydon Canal Company In re, 9 A. & E. 522; Morphett, In re, 2 D. & L. 967.

(*i*) Leaming v. Fearnley In re, 5 B. & Ad. 403; Carpenter v. Joynes, 14 Pract. Reg. 45.

(*k*) Petch v. Fountain, 5 Bing. N. C. 442; S. C. 7 Dowl. 426.

(*l*) Stephens v. Lowe, 9 Bing. 32,

of payment of rent admitted by the award not yet due at the date of the award is void, as the rent may become extinct either by surrender or eviction before it is due (*m*).

(*m*) Barnardiston v. Fowler, 10 Mod. 204.

CHAPTER III.

THE DURATION OF THE ARBITRATOR'S AUTHORITY.

Contents of the third chapter.

WE now proceed to consider the duration in point of time of the arbitrator's authority, when it commences, and when it terminates. Section one treats of its commencement, and of its termination either by the making of the award, or by the expiration of the period (if any) limited by the submission for that purpose. In section two is shown how the time in respective instances may be enlarged by the arbitrator, the court, or the parties. Section three declares how the arbitrator's authority may permanently be put an end to, through a revocation of the submission, by the will of a party, or by the operation of law.

SECTION I.

OF THE DURATION OF THE ARBITRATOR'S AUTHORITY WHEN NOT ENLARGED OR REVOKED.

Commencement of the arbitrator's authority.

I. *When the submission prescribes no time within which the award is to be made.*]—The authority of the arbitrator

commences from the time of the agreement to refer being entered into, and he may make his award on the same day on which the submission is executed (*a*). But when there are several parties to a deed of submission, and the consideration to each to execute it is the accession of all the parties to the reference, the authority of the arbitrator does not commence until all have executed it; and even though the submission be several as well as joint, he has no power to decide on a separate matter in difference between two of those who have signed it, when there are others who have not executed it (*b*).

Natural duration.

The authority of the arbitrator may be said to extend to its natural duration when it is terminated only by the expiration of the period, if any, originally prescribed for it in the submission, or by the making of the award within that time. The other methods of terminating the power of the arbitrator, may more properly be considered as revocations of the submission, and are so treated.

Duration for life, no limit in submission.

If the submission limits no time within which the arbitrator is to make his award, his authority to make it will continue for his life, unless it be revoked. There is no necessity to resort to any implication that the award is to be made within a reasonable time, for it is open to the parties to request the arbitrator to proceed within a reasonable time; and if, after such request, the arbitrator neglect and refuse, such neglect on his part will be a good ground for revoking his authority (*c*). In an old case it was held, that if the submission was to the arbitrator "when his occasions would permit," convenient time must be given him after request, and if no award were then made, the parties might revoke his authority (*d*).

The termination of the arbitrator's power by revocation is considered in a subsequent section of this chapter.

Reference at Nisi Prius no limit.

Though on the reference of a cause at Nisi Prius an

(*a*) Anon. Latch. 14.
(*b*) Antram v. Chace, 15 East. 208.
(*c*) Salter v. Yeates, 5 Dowl., 291; See report of S. C. 2 M. & W. 67; Curtis v. Potts, 3 M. & S. 145; Macdougall v. Robertson, 2 Y. & J. 11; See note, p. 19.
(*d*) Newgate v. Degelder, 2 Keb. 10, 20, 24; S. C. Bac. Ab. Arb. D.

arbitrator is in many respects looked upon as substituted for the jury, he is not limited in making his award to the period before the jury process is returnable (*e*); if instead of having to award, he has only to certify for whom and for what amount of damages the verdict is to be entered, he is equally unfettered as to time, and his certificate will be valid, though made when the assizes are over, though the return day of the jury process has passed, and though no order of Nisi Prius has in fact been drawn up (*f*).

Limit on Scotch reference.

By the Scotch law it is said if a blank be left in the submission for the day within which the award is to be made, the arbitrator's power is limited to a year from the date of the last subscription of any of the parties to the reference (*g*).

But a submission of this description would probably by the law of England be construed to be a general authority to make the award as if no time had been mentioned, and not be vitiated by the omission to fill up the blanks (*h*).

Arbitrator cannot fix a limit.

When the submission limits no time for making the award, the arbitrator, in the absence of an express power to do so, cannot himself fix a limit for making the award, so as to render an award made after that time invalid (*i*).

Award must be within the time limited.

II. *When the submission prescribes a limited time for making the award.*]—When the submission fixes a limit, the award must be made within it, unless further time be subsequently given. How that further time is to be obtained is treated of in the next section.

"Within" includes the last day.

If matters are referred to an arbitrator on the 29th of June, and he is to make his award within five calendar months after the matter is referred to him, the 29th of June is excluded in the computation of time, and an award made

(*e*) Salter v. Yeates, 5 Dowl. 291; S. C. 2 M. & W. 67.

(*f*) Salter v. Yeates, 5 Dowl. 291; S. C. 2 M. & W. 67; Tomes v. Hawkes, 10 A. & E. 32.

(*g*) Taylor v. Grieve, Fac. Coll. 25 Nov. 1800, cited in Johnson v. Cheape, 5 Dow. 256.

(*h*) See Macdougall v. Robertson, 2 Y. & J. note, p. 19.

(*i*) Morphett In re, 2 D. & L. 967.

on the 29th of November is good as being made within the limited period (*k*). If he has "until" a day named to make his award, the word "until" may be construed either inclusive or exclusive; and as the construction should be put upon it, *ut res magis valeat quam pereat*, the arbitrator will have the whole of the day named included, and may make his award at any time during that day (*l*). When the award is to be made ready to be delivered to the parties before a certain day, executing it between the hours of eight and nine of the evening previous, is within due time (*m*).

"Until" a certain day.

On a limitation of the time simply in months, without stating whether they are to be calendar or lunar months, and without anything in the context to show that the parties meant calendar months, the duration of the authority of the arbitrator is to be computed by lunar months (*n*).

Months lunar not calendar.

An arbitrator who is appointed to make a periodical assessment of damages, occasioned by the continued working of a mine, at the expiration of every two months from a particular day, must make his assessment within a reasonable time after the two months have expired; for the limitation of the periods is imperative, and not merely directory (*o*).

Periodical limits.

In cases of references under the provisions of the Lands Clauses Consolidation Act, 1845, when two arbitrators have been appointed, and neither of them refuse or neglect to act, the award must be made (unless they enlarge the time) "within twenty-one days after the day on which the last of such arbitrators shall have been appointed" (*p*).

Limit under the Lands Clauses Act.

Two arbitrators acting.

In other cases under the Act the limit does not seem so clearly defined. When two arbitrators are appointed, but one refuses, or for seven days neglects to act, the other may proceed ex parte according to section 30. His award must,

One of two acting.

(*k*) Higham v. Jessop In re, 9 Dowl. 203.

(*l*) Kerr v. Jeston, 1 Dowl. N. S. 538; Knox v. Simmonds, 3 Bro. Ch. Cases, 358; See Dakins v. Wagner, 3 Dowl. 535; R. v. Stevens, 5 East. 244.

(*m*) Withers v. Drew, Cro. Eliz. 676.

(*n*) Swinford, In re, 6 M. & S. 226.

(*o*) Stephens v. Lowe, 9 Bing. 32.

(*p*) 8 & 9 Vic. c. 18, s, 31; See Appendix of Statutes; Skerratt v. North Staffordshire Railway Company, 17 L. J., Ch. 161.

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it is apprehended, be made within three calendar months by the provisions of s. 23, but it is not quite obvious what date is to be fixed as the commencement of the three months, whether the date of his own appointment, or the date of the appointment of the last of the two arbitrators, or, as it may reasonably be construed, the date of the commencement of his power to proceed ex parte, which is practically the date of a fresh appointment as single arbitrator.

Single arbitrator.

If the parties concur in the appointment of a single arbitrator, there is nothing in the Act to limit his authority, unless section 23, which says that "if when a matter is referred to arbitration, the arbitrators, or their umpire, shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by a jury," is to be held as applying to a sole arbitrator, though in terms it contemplates only the case of two arbitrators and an umpire.

This point is further considered in treating of the duration of the umpire's authority (*q*).

Limit of time on reference between the Post Office and Railway Companies.

Twenty-eight days after the appointment of the second arbitrator is the duration of time allowed by the statute to the arbitrators appointed to decide disputes between the Postmaster-General and Railway Companies respecting the carriage of the mails. On failure of the arbitrators to award within that time, the umpire has a similar period given to him (*r*).

Arbitrator cannot alter award when made.

III. *Authority of the arbitrator determined by making the award.*]—As soon as the award is made the authority of the arbitrator having once been completely exercised according to the terms of the reference, is at an end. He is not at liberty after executing the award to exercise a fresh judgment on the case, and alter the award in any particular. If he does so in fact, the alteration will be merely nugatory, and the award, as originally written, will stand good; his

(*q*) See P. 2, ch. 4, s. 4, d. 4. See Appendix of Statutes.
(*r*) 1 & 2 Vic. c. 98, ss. 16, 18;

act will be like a mere spoliation by a stranger (*s*). He is so entirely *functus officio*, that he cannot even correct a manifest error in the calculation of figures (*t*), or where the defendant is by the award directed to pay costs, substitute instead the name of the plaintiff, though such amendment be merely to make the expression of his will correspond with his original intention (*u*).

Award set aside, cannot make new one.

Setting the award aside as void does not renew his authority, so as to enable him to make a fresh award. The authority once executed, though ineffectually, is gone for ever.

Power to make several awards.

Sometimes the submission directs or empowers the arbitrator to make one or more awards. Under such a special provision his authority will of course not necessarily be terminated by the making one award, though final as to part. It is not till he has made what he intends as a last and final award within the meaning of the submission, that his power can be considered as executed (*x*).

Award void making new one by statute.

It seems, under peculiar circumstances, though the award is intended to be final, an arbitrator may make a second award, if the first be invalid. A railway company was empowered by Act of Parliament to carry its line by means of a bridge over another railway without the consent of the owners of the latter railway. In case the engineers could not agree on a plan for the bridge, an arbitrator was to settle the plan. The engineers not agreeing, the arbitrator appointed by the Act made an award setting forth a plan for the bridge. This award was resisted by one of the parties interested as exceeding the authority given by the Act. The objection was felt to be of weight, and the award was in consequence abandoned as invalid by the other party, at whose request a second award was made by the arbitrator respecting the same matter. The Court of Chancery, dis-

(*s*) Brooke v. Mitchell, 6 M. & W. 473; Henfree v. Bromley, 6 East 309; Anon. Jenk. Rep. 129; Trew v. Burton, 1 C. & M. 533.

(*t*) Irvine v. Elnon, 8 East. 54.

(*u*) Ward v. Dean, 3 B. & Ad. 234; Hall v. Hinds, In re, 2 M. & G. 847.

(*x*) Dowse v. Coxe, 3 Bing. 20: Stephens v. Lowe, 9 Bing. 32; Wrightson v. Bywater, 3 M. & W. 199.

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tinguishing this from a reference by private agreement of parties, held that the arbitrator was not functus officio by making the first award, and that the second was as valid as if the first invalid award had not been made (*y*).

SECTION II.

ENLARGING THE TIME FOR MAKING THE AWARD.

Enlarging the time.

1. *Enlargement of the time by the arbitrator.*]—Having treated of the ordinary duration of the arbitrator's authority, we will now examine how it may be prolonged by enlargement.

We have previously seen that the authority of the arbitrator expires, if he has not made his award within the time limited by the submission. It often happens that circumstances prevent the award being made in time. In order to prevent the expense and trouble already incurred in the reference from being fruitless, the submission generally provides that the arbitrator, either with or without the consent of a judge or the court, or a judge alone, may give an extended period for making the award. The more common and the better practice is to give the arbitrator alone power to enlarge the time for making it.

No implied power to enlarge.

Unless the submission confers this power upon him, he cannot by any act of his own prevent his authority from expiring with the lapse of the time originally allotted.

Enlargement should be during original time.

When he has the power, and feels it necessary to use it, he should take care to make the enlargement during the

(*y*) Great North Western Railway Company v. Clarence Railway Company, 1 Collyer, Cas. in Chan. V. C. K. B. 507.

time primarily fixed for making the award. In one case a suggestion was thrown out by a judge, that an enlargement made immediately after the expiration of the original limit might possibly be valid (*a*), but there was no expression of a positive opinion even there, and there certainly has not been any decision supporting such a view. So far from it, the court has refused to enforce an award by attachment, where the arbitrator's indorsement for enlarging the time, in pursuance of a provision that the time should be enlarged as he might require and a judge might think reasonable, was dated on a day subsequent to the expiration of the time originally given for making the award (*b*).

Enlargement after period under special power good.

In a recent case, however, decided by the Lord Chancellor of Ireland, Sir E. Sugden, where the submission was peculiar, an enlargement made after the expiration of the original time was held valid. By the deed of submission reciting that one party had nominated A., and the other party B., to be arbitrators, it was agreed that they or the other persons for the time being appointed and acting in their stead should, before proceeding with the business of the reference, appoint a third arbitrator, and that the three arbitrators for the time being, or any two of them, should make and publish one or more awards, "provided that the last of the awards should be made and published before the 1st of July, 1843, or before such other later or other time as any two of the arbitrators for the time being should by writing appoint for that purpose, and that every two of the arbitrators for the time being should have power from time to time, by writing, to enlarge and extend the time therein mentioned for the making of their last award, order, direction, or determination, as to them respectively should seem fit or proper, *and that, whether such time should have previously expired or not.*" It was also agreed that X. should appoint an umpire, who, if no two of the arbitrators should agree, was to act; that if either A. or B. became incapable or refused to act, the parties were respectively to nominate fresh arbitrators in their

(*a*) Reid v. Fryatt, 1 M. & S. 1. Practice, 827, 9th Ed.
(*b*) Good v. Wilks, cited Tidd's

stead, and if either party failed to do so, then the third arbitrator, or if there were no third arbitrator, the umpire should name an arbitrator in lieu of the one who so became incapable or refused.

The plaintiff's arbitrator refused to act, and nothing was done in the reference before the 1st of July, 1843. After that day X. appointed an umpire, and the latter appointed an arbitrator in lieu of the plaintiff's arbitrator, the plaintiff not appointing another pursuant to the deed. These two arbitrators appointed a third, and all three together, long after the 1st of July, 1843, enlarged the time. The Lord Chancellor of Ireland held, that under the provisions of the submission the enlargement of time was valid, and that by the enlargement all the powers of the arbitrators were revived (*c*).

Enlarging "until" a certain day.

If the time is enlarged "until" a day named, as the word "until" may be construed either inclusive or exclusive, the arbitrator will generally have the whole of the day named included, and may make his award at any time during that day (*d*).

Enlarging after death of a party.

If the submission provides that the death of a party shall not be a revocation, and contains the usual power for enlarging the time, as the arbitrator has express power given him to make his award after the death of either party, so he has incidentally the same power of enlarging the time after that event that he had before (*e*).

When judge's order for enlargement to be made.

When the submission directs that the time may be enlarged as the arbitrator may require, and as a judge or the court may think just and reasonable; if the arbitrator, within the time limited, makes an endorsement on the submission that he requires further time, the judge's order ratifying that enlargement may be obtained after the original time has elapsed (*f*). But it must be obtained before the award is

(*c*) Dimsdale v. Robertson, 2 Jones v. Latouche, 58.

(*d*) Kerr v. Jeston. 1 Dowl. N. S. 538; Knox v. Simmonds, 3 Brown, C. C. 358. See Dakins v. Wagner, 3 Dowl. 535. R. v. Stevens, 5 East, 244.

(*e*) Tyler v. Jones, 3 B. & C. 144; Clarke v. Crofts, 4 Bing. 143.

(*f*) Reid v. Fryatt, 1 M. & S. 1.

executed, or the arbitrators will have no authority to make it (*g*). This provision requiring that a judge's order should be obtained to authenticate the enlargement by the arbitrator has been considered unadvisable, and that the question of enlargement had better be left to the discretion of the arbitrator alone (*h*).

Enlargement by two of three arbitrators.

When a cause is referred to two arbitrators with power to them to appoint a third, the award to be made by a day named or such other day as they or any two of them shall appoint; the two first named cannot make a valid enlargement of the time until the third is appointed, as enlarging the time is an act of judgment, and the parties have a right to have all three in a situation to exercise a judgment on the point (*i*).

How enlargement should be made.

Unless the submission prescribes the mode in which the enlargement is to be made, the arbitrator may, it seems, adopt any mode that expresses his intention of enlarging the time. A verbal appointment made to both parties for a future meeting to be held on a day beyond the limit of the original period, to which neither parties objected, was considered a sufficient enlargement to that day, and the award made on that day was sustained as made within due time (*k*).

According to the submission.

If the submission directs the manner in which the enlargement is to be made, that direction should be literally followed.

By writing indorsed.

The ordinary provision in an order of Nisi Prius, after directing that the arbitrator shall make and publish his award on or before a certain day therein named, concludes thus, "or on or before any other day to which the said arbitrator shall by any writing under his hand to be indorsed hereon, from time to time enlarge the time for making his said award." In order to comply with this clause and render the enlargement valid, it must be in writing, and

(*g*) Mason v. Wallis, 10 B. & C. 107.
(*h*) Reid v. Fryatt, 1 M. & S. 1.
(*i*) Reade v. Dutton, 2 M. & W. 69; Hughes v. Garnett, cited 2 M. & W. 69.
(*k*) Burley v. Stephens, 1 M. & W. 156.

must be indorsed on the order of reference (*l*). Where the submission empowered the arbitrator thus "to enlarge the time to the 2nd of November, or to such other or ulterior day as the said arbitrator shall ultimately appoint and signify, in writing under his hand to be indorsed on the said order of reference," the court held, that no obligation rested on the arbitrator to make any indorsement of the enlargement of the time unless it was extended beyond the 2nd of November, and that an enlargement to the 2nd of November, which was not indorsed on the order of reference, was perfectly good (*m*).

No particular form of enlargement.

No particular form of words is necessary for an indorsement to enlarge the time under the usual power in the submission. If the arbitrator in substance express his opinion that the time should be enlarged, it is sufficient. An indorsement, "I direct that a rule of this court shall be applied for by counsel's hand to enlarge the time for making my award," the Court of Exchequer inclined to think a good execution of the ordinary power given to the arbitrator to enlarge the time, because it amounted to an expression of his opinion, that an enlargement was requisite, though it also went on to direct that a rule of court should be applied for, which according to the submission was unnecessary (*n*). No decision was, however, given on the point. It may also be observed, that the indorsement does not direct an enlargement to any day certain, as the usual provision in the submission would seem to require.

Enlarging from time to time.

It is not necessary that the submission expressly give the arbitrator power to enlarge *from time to time*, for if it direct the award to be made on a certain day, or on or before any other day to which the arbitrator should enlarge the time, he is not limited to a single enlargement, but may enlarge the time as often as he finds necessary (*o*). So where he cannot

(*l*) Leggett v. Finlay, 6 Bing. 255.

(*m*) Davison v. Gauntlett, 3 M. & G. 550; S. C. 1 Dowl. N. S. 198.

(*n*) Hallett v. Hallett, 5 M. & W. 25; S. C. 7 Dowl. 389.

(*o*) Payne v. Deakle, 1 Taunt. 509; Barrett v. Parry, 4 Taunt. 657; Leggatt v. Finlay, 6 Bing. 255.

enlarge of his own authority, but is at liberty to make an application to the court to enlarge the time, he may in like manner make several applications, and is not functus officio at the expiration of the time granted by the first enlargement (*p*).

Enlarging under the Lands Clauses Act.

Under the Lands Clauses Consolidation Act, 1845 (*q*), when two arbitrators are appointed pursuant to the Act, they have a limited power of enlargement, for the original duration of their power is twenty-one days after the day on which the last of the arbitrators is appointed, and they may enlarge the time (*r*), but not further, it would seem, than three calendar months from such appointment (*s*).

Enlarging time by consent a new submission.

II. *Enlargement of time by consent of the parties.*]—If the submission contain no power for enlarging the time, or if, when there is such a power it has been omitted to be exercised, and the original time has elapsed without an award being made, the authority of the arbitrator may be revived and further time granted by the consent of the parties (*t*). This, if in writing, requires a stamp, even though indorsed on the arbitration bond (*u*). Sometimes a judge's order is drawn up by consent for enlarging the time (*x*). But in whatever manner the consent be given, it would seem to amount to a new submission. Therefore, where the submission is by a judge's order or order of Nisi Prius, the enlargement of time should be made by an instrument of the same degree, or else there may be no power of enforcing the award by attachment (*y*).

Conduct of

The conduct of the parties will often be taken to amount

(*p*) Anon. 2 Chitty Rep. 45.

(*q*) 8 & 9 Vict. c. 18. See Appendix of Statutes. See s. 1, d. 2, of this chapter, p. 133, as to the limit fixed by the statute. Skerratt v. North Staffordshire Railway, 17 L. J., Ch. 161.

(*r*) s. 31.

(*s*) s. 2, 3.

(*t*) Benwell v. Hinxman, 1 C. M. & R. 935.

(*u*) Stephens v. Lowe, 9 Bing. 32; Evans v. Thompson, 5 East, 189.

(*x*) Staite v. Haddon, 9 Dowl. 995.

(*y*) Hoyle v. Jennings, cited in Lawrence v. Hodgson, 1 Y. & J. 16; Burley v. Stephens, 1 M. & W. 156.

parties, consent to enlargement.

to a consent on their parts to an enlargement of the time, and a consequent continuation of the arbitrator's authority.

Attending meetings after time expired.

If after the time has expired without enlargement, or where an invalid enlargement has been made, they attend further meetings before him with a full knowledge of the circumstances, and without making any objection on that ground, they will be precluded from saying the authority of the arbitrator was at an end (*z*). But although attending several times before the arbitrator may waive all objections to the sufficiency of previous enlargements of the time made by him, invalid for want of a judge's order to ratify them as required by the submission, such attendances cannot be construed to imply a consent that the arbitrator may make future enlargements by himself alone, and an enlargement so made subsequent to the last meeting in the reference is entirely void (*a*).

Bringing forward new matters.

After the case closed on both sides, and the time expired, requesting the arbitrator to take some new matters into his consideration is such a recognition of his authority as continuing, that the consent of the party making it to extend the time may fairly be implied, for it manifestly refers to an award which the arbitrator has still to make (*b*).

Stating day as limit.

If a party write to an umpire, telling him that the 29th of November is the last day on which he can make his award, it seems very doubtful whether it is competent for that party afterwards to object that an award made on the 29th of November is made too late (*c*).

Enlarging time by consent discharge of surety.

When the time has once been suffered to expire without an award having been made, a surety for the performance of the award will be discharged, and his liabliity will not be revived by the parties agreeing to give the arbitrator further time for making his award. Thus, where the attorney in a cause referred had undertaken to pay the amount of debt

(*z*) Hick, In re, 8 Taunt. 694; Hallett v. Hallett, 7 Dowl, 389; Leggett v. Finlay, 6 Bing. 255; Lawrence v. Hodgson, 1 Y. & J. 16.

(*a*) Mason v. Wallis, 10 B. & C, 107.

(*b*) R. v. Hill, 7 Price, 636.

(*c*) Higham & Jessop, In re, 9 Dowl. 203.

and costs which his client should be awarded to pay, and the time had been allowed to expire without enlargement, but was afterwards enlarged by a judge's order drawn up "by consent of the attorneys and agents on both sides," it was held the undertaking was at an end when the limited time had once passed by, and that the attorney's consenting to the enlargement was only an act in performance of his duty to his client as attorney in the cause, and therefore ought not to be considered as a new personal undertaking to pay the amount (*d*).

Court no common-law power to enlarge.

III. *Enlargement of time by the courts of law.*]—Without the consent of the parties, neither the court or a judge could at common law grant any enlargement when the time had lapsed; the authority of the arbitrator was gone, and all the proceedings already taken became ineffectual (*e*).

Power given by 3 & 4 W. IV. c. 42, s. 39.

To remedy the inconvenience arising from this failure of the reference, the statute 3 & 4 W. IV. c. 42, has made a provision in the 39th section, which is in the following words:—"And whereas it is expedient to render references to arbitration more effectual, be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of Nisi Prius, in any action now brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall, and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend

(*d*) Staite v. Haddon, 9 Dowl. 995.

(*e*) Halden v. Glasscock, 5 B. & C. 390; S. C. 8 D. & R. 151; Teasdale v. Atkins, cited Tidd's Pr. 826, 9th Ed.

the reference; *and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award.*"

Court can enlarge, though no attempt to revoke.

It will be observed that the clause in italics giving the judge or court the power of enlargement follows the provision in the same section respecting revocation, and authorizing the arbitrator to proceed notwithstanding any revocation by the party. On this account, Parke, B., at first entertained an impression, that this clause must be taken in connexion with the preceding provision, and that the power of enlargement only existed in the court where there had been an attempt to revoke the submission. Further consideration, however, induced the learned judge to change his opinion, and on a subsequent occasion to state that he agreed with the rest of the Court of Exchequer in holding that the power was general, and applied to all cases, whether there had been any attempt to revoke or not (*f*); and this is the view taken by all the courts (*g*).

Whether court can enlarge when arbitrator empowered.

Held in the Q. B. court has no power.

There is a difference of opinion among the courts, whether this clause vests any authority in the court or a judge when the submission gives the arbitrator power to enlarge the time. The question was first raised before Patteson, J., in the Bail Court, in a case where the time for making the award which had been several times enlarged by the arbitrator pursuant to the submission, had intentionally been allowed to expire. The rule was drawn up calling on the lessors of the plaintiff to consent to the arbitrator's proceeding with the reference. The learned judge being of opinion that the court could only enlarge the time when no power for that purpose was given to the arbitrator, dismissed the application with costs (*h*). To bring all the cases together, it may be proper here to notice an expression of Lord Denman, C. J., in answer to an excuse of counsel for certain conduct

(*f*) Potter v. Newman, 2 C. M. & R. 742; Burley v. Stephens, 1 M. & W. 156.

(*g*) Doe d. Jones v. Powell, 7 Dowl. 539; Parberry v. Newnham, 7 M. & W. 378; S. C. 9 Dowl. 288; Lambert v. Hutchinson, 2 M. & G. 858.

(*h*) Doe d. Jones v. Powell, 7 Dowl. 539.

that the time for making the award would have expired. The expression was as follows:—"The court would probably have enlarged the time, for the clause at the end of s. 39 is not confined to arbitrators under any particular circumstances." This remark, however, can hardly be considered as an expression of opinion on this particular point. It may have been uttered with respect to the question previously discussed, whether any attempt at revocation was necessary to give the court jurisdiction. As far as can be gathered from the report, the arbitrator in this case had no power of enlargement (*i*).

Held in the Ex. court has power.

The Court of Exchequer takes a different view of the statute from Patteson, J. In a subsequent case, where the arbitrator had a power of enlargement which he had not exercised, this court, notwithstanding the case (*k*) decided by that learned judge was relied on, distinctly asserted its power under the statute, and exercised it by granting a rule for the enlargement of the time (*l*).

Held in the C. P. court no power.

The Court of Common Pleas, however, in a still more recent instance, seemed strongly disposed to adopt the view taken by Patteson, J. The arbitrator under the usual power had enlarged the time: it had, however, been suffered to expire, and nothing had been done in the reference for nearly three years. The court, in the exercise of its discretion, on the ground of the lapse of time alone, refused the rule for an enlargement; but Tindal, C. J., speaking of the power given by the statute, said, "When the rule or order of reference contains no power to enlarge the time, it is a very useful provision, as it enables the court or a judge to supply the defect. But I doubt whether the statute empowers the court or a judge to interfere when the arbitrator has power to enlarge, but has inadvertently permitted the time to expire without exercising his power (*m*).

(*i*) Salkeld and Clarke, In re, 4 Jur. 1132.

(*k*) Doe d. Jones v. Powell, 7 Dowl. 539.

(*l*) Parbery v. Newnham, 7 M. & W. 378; S. C. 9 Dowl. 288; 5 Jur. 175.

(*m*) Lambert v. Hutchinson, 2 M. & G. 858.

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Court may enlarge after period.

A distinction between enlargement by the arbitrator and enlargement by the court should be noted. The arbitrator must exercise his power of enlarging during the period limited for making his award, while the period within which the court will make an order for this purpose is only limited by its own discretion.

Before any application can be made for an enlargement, the submission must be made a rule of court (*n*).

Rule to enlarge not granted ex parte.

A rule or order to enlarge the time will not be granted ex parte, without affording the opposite party opportunity to show cause against it (*o*).

Statute not affect equity courts.

IV. ***Enlargement of time by a court of equity.***]—A court of equity has, it seems, no power to enlarge the time under the enactments of the 3 & 4 W. IV. c. 42, s. 39, for it has been determined that the operation of this section is confined to the courts of law (*p*).

Time practically enlarged in equity.

In some instances, where by the misconduct of a party to the submission the arbitrators have been unable to perform their duty within the time limited, as where the seller prevented them from entering upon lands to value them pursuant to a contract for sale at a price to be fixed by arbitration, equity has practically enlarged the time, by directing the arbitrators to make their award notwithstanding the time had expired, and by enforcing a specific performance against him according to their valuation (*q*).

(*n*) Lambert v. Hutchinson, 2 M. & G. 858; 2 Tidd. 859.

(*o*) Clarke v. Stocken, 5 Dowl. 32; 3 Scott, 90.

(*p*) Hall v. Ellis, 9 Sim. 530.

(*q*) Morse v. Merest, 6 Madd. 26. See Dimsdale v. Robertson, 2 Jones & Latouche, 58.

SECTION III.

OF REVOKING THE ARBITRATOR'S AUTHORITY.

1. *Revocation by common law at the will of a party.*]— At common law the authority of the arbitrator might at any time before the award was made have been revoked at the pleasure of any party to the submission (*a*), whether the submission was by agreement in writing (*b*), by bond (*c*), or deed (*d*), by judge's order (*e*), by order of Nisi Prius (*f*), or by rule of court (*g*), and notwithstanding it was made irrevocable by the express words of the submission, for nothing under a legislative power could make that irrevocable which was in its nature revocable, for the arbitrator being constituted and put in the place of the parties by their consent to act for them, could no longer act than he had such consent, and any award made subsequent to a revocation was a mere nullity (*h*).

At common law submission revocable until award made.

Either party could revoke the submission, and if there were several plaintiffs or several defendants, any one of those plaintiffs or defendants could, it seems, by revoking the authority of the arbitrator, render the submission void as to all, even against the will of his co-plaintiffs or co-defendants (*i*). This, indeed, has been doubted in works of great authority (*j*). It is clear that in equity, where de-

One of many parties revoking submission as to all.

(*a*) Bac. Ab. Arb. B.; Green v. Pole, 6 Bing. 443; Com. Dig. Arb. D. 5.

(*b*) Newgate v. Degelder, 2 Keb. 10, 20, 24.

(*c*) Milne v. Gratrix, 7 East, 607.

(*d*) Warburton v. Storr, 4 B. & C. 103.

(*e*) Aston v. George, 2 B. & A. 395; Greenwood v. Misdale, 1 M'Lel. & Y. 276.

(*f*) Green v. Pole, 6 Bing. 443.

(*g* Green v. Pole, 6 Bing. 443.

(*h*) Bac. Ab. Arb. B.; Hide v. Petit, 1 Cas. in Chanc. 185; S. C. 2 Freem. 133; Marsh v. Bulteel, 5 B. & A. 507; S. C. 1 D. & R. 106.

(*i*) Com. Dig. Arb. D 5; Rolle Ab. Authority, D. 1, 2, p. 331; Vin. Ab. Authority, H. 1, 2.

(*j*) Bac. Ab. Arb. B.; West's Symb., 2 Part. Tit. Compromise, s. 42; Wilde v. Vinor. 1 Brownl. 62.

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fendants often have different interests, the revocation by one defendant may annul the submission (*k*).

Whether revocation of submission under seal need be by deed.

It does not seem to be clearly determined whether, when the submission is under seal, the revocation must be under seal also, though the more general opinion seems to be that a revocation under seal is necessary.

In an action of debt on a bond conditioned to stand to abide by and perform an award, the defendant pleaded, no award made. The plaintiff replied, that after the making of the bond, and before the day, (the limit of the time for making the award,) the defendant "per quoddam scriptum suum cujus datus est eisdem die et anno revocavit et abrogavit," &c., "omnem authoritatem," of the arbitrator (*l*). In another report of the same case, it is stated as the effect of the replication, "that the defendant, by *writing*, did revoke and null the authority of the arbitrator" (*m*). Judgment was given on demurrer for the plaintiff on the ground that the revocation set forth in the replication amounted to a forfeiture of the bond, for that revoking the authority was a breach of the agreement to stand to and abide by the award. In a late case it was assumed on argument that the pleadings in the above case showed that the revocation was by deed (*n*).

Though there is no case deciding that the countermand need be under seal, there are some statements in works of authority to that effect. In an old text-book (*o*) it is said, "If the parties put themselves in award without deed they may discharge the arbitrators without deed, or enlarge the day without deed, but if the submission be by deed it is otherwise, per Finch." In another old work it is stated more strongly. "If the submission be by deed the discharge must likewise be by deed" (*p*). And reference is, in both works, made to the same Year-book, H. 49, Edw. III. 9.

(*k*) Haggett v. Welsh, 1 Sim. 134.

(*l*) Vynior's Case, 8 Coke, Rep. 81, b.

(*m*) Wilde v. Vinor, 1 Brownl. 62.

(*n*) R. v. Wait, 1 Bing. 121.

(*o*) Fitzherbert Ab. Arb. 22.

(*p*) West's Symb. 2 Part. Tit. Compromise, s. 42.

On looking, however, to the Year-book in question, there is nothing to be found on the point.

In one report of Vynior's case (*q*), (though not in Lord Coke's own reports,) Lord Coke is reported to have said, that "if the submission be by writing the countermand must be in writing, if by word I may countermand by word." There is, however, one decided authority that a parol prohibition to the arbitrator's further proceeding in the reference is a full repeal of the authority conferred on him by the arbitration bond (*r*).

Notwithstanding this case, the opinion that a revocation under seal is necessary where the submission is under seal seems to prevail, and as a matter of practice the prudent course would be to draw up the revocation under seal.

Revoking on order of Nisi Prius.

To revoke a Nisi Prius order of reference, while it was revocable by act of a party, a writing not under seal was sufficient (*s*).

From the marginal note of the case last cited (*t*), it would seem that the courts were of opinion that a revocation signed by the attorney acting for a party is sufficient.

Notice of revocation to arbitrator.

In order, however, to make a revocation by act of party complete, notice of it must be given to the arbitrator, or his authority will not be determined; but when the revocation is by marriage or death, no notice of the revocation is necessary (*u*).

Revocation breach of submission.

The act of revocation, however, we have previously (*x*) seen, is a breach of the submission. Before the statute (*y*) of William IV., when revocation by the mere will of the party was possible, the revocation of the submission after it had been made a rule of court was a contempt, and an attachment

(*q*) Reported sub. nom. Wilde v. Vinor, 1 Brownl. 62.

(*r*) Barker v. Lees, 2 Keb. 64.

(*s*) Doe d. Turnbull v. Brown, 5 B. & C. 384; R. v. Bardell, 5 A. & E. 619.

(*t*) R. v. Bardell, 5 A. & E. 619.

(*u*) Marsh v. Bulteel, 5 B. & A. 507; Vynior's Case, 8 Coke, Rep. 81, b.: Com. Dig. Arb. D. 5; Vin. Ab. Authority, E. 3, 4; Blundell v. Brettargh, 17 Ves. 232.

(*x*) See P. 1, ch. 3, s. 8, as to enforcing the submission.

(*y*) 3 & 4 W. IV. c. 42, s. 39.

would issue (*z*), or an action would lie (*a*) against the party revoking.

Submission when made rule of court after revocation.

A submission under the statute the 9 & 10 W. III. c. 15, could not properly be made a rule of court after revocation, and if it were, it would be set aside; for when the submission was gone, there was nothing to make a rule of court; though a submission by judge's order not being dependent on the statute might be made a rule after revocation to enforce the other terms of the order (*b*).

Action for revocation.

If the submission be not one that can be made a rule of court, the only remedy is by action for breach of the bond (*c*), covenant (*d*), or agreement (*e*), to refer, for the revocation is a breach of the promise to "*perform*" the award, although the usual words, "*to stand to and abide by*" the award are omitted (*f*). The costs already incurred in the reference may be recovered as damages. In such an action it is sufficient to allege that the defendant by a certain deed revoked the arbitrator's authority. The pleadings need not aver any notice to the arbitrator, as that is implied in the word revoke, since the revocation is not complete without notice (*g*).

Justification may be pleaded.

The defendant may plead in answer that he was justified in revoking the submission, and if he can show that he had good grounds for the proceeding, judgment will be given in his favour.

Misconduct of arbitrator or party.

If he discover that the arbitrator or the opposite party have grossly misconducted themselves, that would amount to a defence, for it would be hard that he should have to pay them damages for depriving them of a power which they had abused (*h*).

Bankruptcy of opponent.

So when the bankruptcy of a party to the submission will prevent the other party from

(*z*) Haggett v. Welsh, 1 Sim. 134; Green v. Pole, 6 Bing. 443; Milne v. Gratrix, 7 East, 607.

(*a*) Skee v. Coxon, 10 B. & C. 483.

(*b*) Aston v. George, 2 B. & A. 395; King v. Joseph, 5 Taunt. 452.

(*c*) Noble v. Harris, 3 Keb. 745.

(*d*) King v. Joseph, 5 Taunt. 452.

(*e*) Newgate v. Degelder, 2 Keb. 10, 20, 24; Skee v. Coxon, 10 B. & C. 483.

(*f*) Warburton v. Storr, 4 B. & C. 103; Brown v. Tanner, 1 C. & P. 651.

(*g*) Marsh v. Bulteel, 5 B. & A. 507; Vynior's Case, 8 Rep. 81, b.

(*h*) Brown v. Tanner, 1 C. & P. 651; Stewart v. Williamson, 2 M. & P. 765.

reaping any benefit from the award, supposing it to be made in his favour, that will generally excuse the latter for revoking the authority and incurring no further expense in the reference (*i*). So in action of covenant against a woman and her husband, alleging a covenant of the female defendant when sole, to abide by and perform an award, and laying as a breach that the female defendant had revoked the authority of the arbitrators by marriage, it is open for the defendants to plead that the marriage took place with the consent of the plaintiff (*k*).

Marriage by consent.

There is, it seems, no instance of the courts of law interfering to restrain an arbitrator from making an award after revocation. Though the award may be a nullity, the courts of law disclaim the power of preventing him making it (*l*).

II. *Revocation by leave of the court.*]—The arbitrary power of revocation having been much abused, and cases formerly being frequent in which a party having gathered that the opinion of the arbitrator was hostile to him, immediately revoked his submission, the legislature, to prevent the delay and useless expense thus caused, has lately provided, by the 3 & 4 W. IV. c. 42, s. 39, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make

Revocation prohibited without leave of court, &c.

3 & 4 W. IV. c. 42, s. 39.

(*i*) Marsh v. Wood, 9 B. & C. 659.

(*k*) Charnley v. Winstanley, 5 East, 266.

(*l*) R. v. Bardell, 5 A. & E. 619.

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such award, although the person making such revocation shall not afterwards attend the reference," &c. (*n*).

No prohibition unless submission within statute.

But in order to deprive a party of his common law power of revocation, the case must be clearly brought within one of the two distinct branches of the section, either that the parties have consented to a rule of court, judge's order, or order of Nisi Prius in an action, or that the submission contains an agreement for making it a rule of "one of his Majesty's courts of record." This latter branch evidently points to the stat. 9 & 10 W. III. c. 15, and to the submissions within that act (*o*).

Not apply to submission by order of equity.

Yet though the words are identical in the two statutes, a different construction has been put upon them in equity. For we have seen that submissions containing a consent clause have continually, under the statute of William III., been made rules of the Court of Chancery: but in a recent case it has been decided by the Vice-Chancellor (Shadwell) that the provisions respecting arbitration in the act of William IV. apply only to courts of Law (*p*). If this be so, submissions by order of equity would still remain revocable.

Or to indictment.

As the whole section is framed to apply to civil actions only, it does not affect the right to revoke, where an indictment and all matters in difference have been referred by order of Nisi Prius (*q*).

Or till arbitrator has complete authority.

Nor does the statute apply until the submission is complete, and the arbitrators have authority to act unclogged by any condition precedent. For if each of two persons name an arbitrator, but stipulate in their submission that the two arbitrators shall select an umpire before they commence proceedings, the submission, notwithstanding the Act, seems to be revocable until the condition precedent of fixing upon an umpire has been performed (*r*).

(*n*) The Irish Act, 3 & 4 Vic. c. 105, s. 63, has like provisions.

(*o*) R. v. Bardell, 5 A. & E. 619; S. C. sub nom.; R. v. Shillibeer, 5 Dowl. 238; Woodcroft & Jones, In re, 9 Dowl. 538.

(*p*) Hall v. Ellis, 9 Sim. 530.

(*q*) R. v. Bardell, 5 A. & E. 619; S. C. sub nom; R. v. Shillibeer, 5 Dowl. 238; Woodcroft v. Jones, In re, 9 Dowl. 538.

(*r*) Bright v. Durnell, 4 Dowl. 756.

The application for an order for leave to revoke the submission under this section, must be made before the arbitrator has executed his award (*s*).

Court no power after award made.

It will not be granted ex parte. If it is so granted inadvertently, it seems it will be set aside as a nullity, for each party, according to the construction put upon the statute, is entitled to be heard before any order for leave to revoke is made either by a judge or by the court (*t*).

Nor on ex-parte application.

When leave to revoke will be granted.

In order to prevent a recurrence of the old evils, it has been intimated from the bench that the discretion of the court in allowing a revocation will be exercised in the most sparing and cautious manner (*u*).

Matter pending in Chancery.

The inconvenience of having the same matters pending before the two tribunals of Chancery and of the arbitrator at the same time, has been held an insufficient ground for revocation, when the inconvenience was caused by the act of the party who applied for leave to revoke, in filing a bill in Chancery respecting the subject of the arbitration, and who did not suggest that there had been any misconduct on the part of the opposite party or of the arbitrator (*x*).

The following case illustrates the principles on which the court will probably act in respect of these applications for leave to revoke a submission.

Arbitrator admitting evidence objected to.

The order of reference gave the arbitrator the same power as a judge at Nisi Prius to decide on the admissibility of evidence, and to reserve points of law for the opinion of the court. It was also expressly stipulated by the defendant that he should retain the power of objecting to the admission in evidence before the arbitrator of certain depositions. These being tendered in evidence by the plaintiff, and objected to by the defendant, were received by the arbitrator, who, though inclined to think some of the objections good, refused to decide at once on their validity, but offered to state on his award, not every objection, but every material

(*s*) Phipps v. Ingram, 3 Dowl. 669.

(*t*) Clarke v. Stocken, 5 Dowl. 32.

(*u*) Scott v. Van Sandau, Q. B. 102.

(*x*) Woodcroft v. Jones, In re, 9 Dowl. 538.

objection to their reception. The defendant on this applied for leave to revoke his submission, on the ground that the reception of the evidence would render many additional meetings requisite, and that, although the award might ultimately be set aside, yet, according to the practice of the court, he would probably not recover his costs of the reference.

These reasons were, however, held inadequate. Firstly, because the stipulation for the power of objecting to the reception of the evidence was the security provided by the defendant for himself against the chance of any error that might from this cause affect the award. The other ground of refusal was of a more general nature, and was stated by the court avowedly with the view of suggesting general rules for future guidance. It proceeded on the following reasonings:—that either the arbitrator might change his mind and reject the evidence, or that the plaintiff might withdraw it, or that the award might satisfy the losing party that justice had been done; that in any one of these three events the matter in difference would have been well disposed of to the great benefit of the parties: that although it was true that if the evidence was improperly received, and the award for that cause set aside, all the expense would have been in vain, yet that that was a contingency which might never happen; whereas if the submission were at once revoked, all the expenses up to the time of revocation would certainly have been fruitless, the cause would have to be restored to the cause list, and on its coming on again for trial, after many months' delay, would probably soon be discovered by the presiding judge to be a cause which could not properly be decided by a jury, and that if at his suggestion it was sent to a second arbitration, the same career of litigation would be opened for the second time: and that on a balance of the conveniences and inconveniences, the continued progress of the inquiry before the arbitrator held out the prospect of greater benefits and lesser evils to both parties (*y*).

(*y*) Scott v. Van Sandau, 1 Q. B. 102.

In one case the court made absolute a rule for revoking the submission unless the plaintiff would permit the defendant, an executor, to plead a judgment recovered pending the reference by way of a plea puis darrein continuance before the arbitrator, leaving, however, the effect of such a plea to the consideration of the latter (*z*).

Judgment recovered after reference.

The Court of Exchequer recently intimated, that if an arbitrator, to whom an action of debt is referred, receive evidence of a claim for damages for breach of a covenant, as recoverable in the action, notwithstanding the defendant objects that such damages are not a debt, the defendant may properly apply for leave to revoke, since the award would be conclusive against him (*a*).

Arbitrator mistaking the law.

A submission by order of a judge of a county court is not "revocable by either party, except by consent of the judge" (*b*). From this section it would seem that with such consent either party might revoke it, notwithstanding the other wished the reference to proceed.

Submission by order of county court not revocable without leave.

The proviso, however, which contains a clause that the judge "may, with the consent of *both* parties aforesaid, revoke the reference," must be noticed. The ordinary construction of the sentences would imply that this clause applied only in case of proceedings after the award was made; but after the award is made there is no longer anything to revoke; the arbitrator's power is gone. If the clause is to be considered as generally applicable, it would seem in some measure to militate from the construction put on the first part of the section.

On a reference under "The Lands Clauses Consolidation Act, 1845" (*c*), "The Railways Clauses Consolidation Act, 1845" (*d*), and "The Companies Clauses Consolidation Act, 1845" (*e*), each party, on the request of the other, shall

Submission under the Lands, Railways and Companies Clauses Acts not revocable.

(*z*) Alder v. Park, 5 Dowl. 16.
(*a*) Faviell v. Eastern Counties Railway Comp. May 11, 1848.
(*b*) 9 & 10 Vic. c. 95, s. 77. See Appendix of Statutes.
(*c*) 8 & 9 Vic. c. 18, s. 25.
(*d*) 8 & 9 Vic. c. 20, s. 126.
(*e*) 8 & 9 Vic. c, 16, s. 128.

nominate and appoint an arbitrator in the manner prescribed in the several acts, and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other.

Order of equity revocable.

III. *Revocation in equity at the will of a party.*]—A submission by order of equity is as revocable as a submission in an action at common law, and the same consequences generally follow (*e*).

Submission sometimes subsisting in equity after revocation.

When the submission has been revoked without just and reasonable grounds, although the authority of the arbitrators is gone at law, yet a court of equity will in certain cases consider the agreement containing the submission as in some measure subsisting, and refuse its assistance to the party who has so improperly revoked (*f*). The Court of Chancery refused an injunction to prevent a creditor from selling lands which had been conveyed to him as a security for his debt, on the terms that the amount of the debt was to be settled by arbitration, and that the lands were not to be sold until two months after the award, the arbitrators having in fact made their award, though after the debtor who was the applicant to the court had revoked their authority (*g*). Under a like persistance of the arbitrators in making an award despite of a revocation, the same court declined to grant an injunction to prohibit the purchaser from taking possession of a wharf which was agreed to be sold at a price to be fixed by the arbitrators (*h*).

Submission made rule not revocable in Ireland.

The following case cannot, it is apprehended, be considered as good law in England. On a motion before the Irish Court of Chancery to set aside an award pursuant to a submission made an order of Chancery, under the Irish stat. 10, W. III. c. 14 (*i*), on the ground that the party

(*e*) Haggett v. Welsh, 1 Sim. 134; Hide v. Petit, 1 Cas. in Chanc. 185; S. C. 2 Freem. 133.

(*f*) Pope v. Lord Duncannon, 9 Sim. 177.

(*g*) Harcourt v. Ramsbottom, 1 Jac. & W. 505.

(*h*) Pope v. Lord Duncannon, 9 Sim. 177.

(*i*) This statute is identical with the English Act, 9 & 10 W. III. c. 15.

moving had revoked the arbitrator's authority before the award was executed, the court refused the motion, and confirmed the award, on the ground that after the submission was made an order of court, the party had no longer any power to revoke (*k*).

Stat 3 & 4 W. IV. c. 42, s. 39, not apply to equity.

We have before noticed that it would seem, from a decision of Vice-Chancellor Shadwell, that the statute 3 & 4 W. IV. c. 42, which in section 39 prohibits a party from revoking his submission (if capable of being made a rule of court) without leave of the court or a judge, leaves submissions made rules of the Court of Chancery unaffected by its provisions (*l*).

Bankruptcy no revocation.

IV. *Revocation by bankruptcy.*]—It seems now settled that the bankruptcy of a party, subsequent to a reference, will not of itself operate as a revocation of the submission.

Arguments in favour of bankruptcy being a revocation.

The question has often been mooted. In favour of bankruptcy being a revocation, it has been argued that it deprives the bankrupt of all control over his property, including often the subject of the reference, thus rendering him liable to process of contempt for disobedience to an award, which the law itself, by taking his property, prevents him from performing—that the revocation is for the benefit of his opponent also, who can rarely gain anything from an award in his favour against a bankrupt, and who probably would not have agreed to refer had the party been a bankrupt at the time of the submission being made—that as a submission not originally binding all parties is void, it follows as a rational consequence that if by matter ex post facto a submission becomes ineffectual as to one party, it must also be altogether defeated (*m*).

Arguments against it.

To this it is answered, that bankruptcy does not put an end to a suit at law instituted by the bankrupt; that it cannot therefore determine an arbitration founded on that suit;

(*k*) O'Sullivan v. Hutchins, cited in Bignold v. Springfield, 7 C. & F. 85.

(*l*) Hall v. Ellis, 9 Sim. 530.

(*m*) Marsh v. Wood, 9 B. & C. 659.

that if a bankrupt has commenced an action without cause, the bankruptcy neither does nor ought to protect him against the consequences of it (*n*); that bankruptcy is the act of the bankrupt himself (*o*); that he is no more to be excused from performance of an award, than a person who has wilfully sold the subject of reference, and thus rendered performance on his part impossible; that the fact of a party becoming bankrupt after he has entered into a contract, cannot put an end to or disturb the pecuniary interests of other parties to that contract (*p*); that as he remains liable at law, in case the assignees do not adopt his contract (*q*), he ought also to be bound to abide the event of his submission.

No case deciding bankruptcy to be a revocation

There is no case in which the decision necessarily proceeds on the principle that bankruptcy amounts in itself to a revocation. The case which is thought to come nearest to it, merely decided that the bankruptcy of one party justified his opponent in revoking the submission (*r*). And it probably would now be considered by the court or a judge as a good ground for allowing a revocation under the statute (*s*). But both before (*t*) and since that decision, the courts have expressly held that the bankruptcy is no revocation in law, and that whether the submission is on a verdict taken or otherwise (*u*). They have indeed avoided deciding the general question in some instances, where there were other clear grounds for refusing to interfere with the award.

Arbitrator as stakeholder.

Thus where the arbitrator stood in the situation of a stakeholder, the court refused to set aside the award, leaving the party to raise the question in a more solemn manner; and on the case coming on again in another form, held, that as the authority of the arbitrator was there coupled with an

(*n*) Andrews v. Palmer, 4 B. & A. 250.
(*o*) Tayler v. Marling, 2 M. & G. 55.
(*p*) Taylor v. Shuttleworth, 8 Dowl. 281.
(*q*) Boorman v. Nash, 9 B. & C. 145.
(*r*) Marsh v. Wood, 9 B. & C. 659.
(*s*) 3 & 4 W. IV. c. 42, s. 39.
(*t*) Andrews v. Palmer, 4 B. & A. 250.
(*u*) Hemsworth v. Brian, 1 C. B. 131.

interest, it was not in that instance at least revoked by the bankruptcy (*x*). But when the arbitrator has been clothed with nothing but the ordinary authority, the courts have equally refused to set aside the award (*y*), have sustained the judgment entered up on the verdict taken at Nisi Prius (*z*), and have enforced the award against the bankrupt by attachment, notwithstanding his affidavit that the bankruptcy rendered it impossible for him to perform the award, by depriving him of the property ordered to be delivered up (*a*).

Award against bankrupt enforced.

v. *Revocation by insolvency.*]—The case of insolvency does not seem to differ in principle from that of bankruptcy. Where a cause had been referred by a judge's order, and the plaintiff had been discharged under the Insolvent Debtors' Act before the award was made, the Court of Exchequer refused an application on the part of the assignee to set aside the award on the ground of the insolvency operating as a revocation. The court refused to decide the question on such a motion, or to give any opinion on the effect of the insolvency (*b*).

Whether insolvency a revocation.

VI. *Revocation by marriage of a female party.*]—The marriage of a woman, who is a party to a submission, before the award is made, is a countermand of the arbitrator's authority, for marriage is a civil death of all her rights (*c*), and it needs not notice to the arbitrator to make the revo-

Marriage of female party a revocation.

(*x*) Taylor v. Shuttleworth, 8 Dowl. 281; Tayler v. Marling, 2 M. & G. 55.

(*y*) Snook v. Hellyer, 2 Chitt. 43.

(*z*) Andrews v. Palmer, 4 B. & A. 250.

(*a*) Hemsworth v. Brian, 1 C. B. 131; R. v. Hemsworth, 3 C. B. 745; Haswell v. Thorogood, 7 B. & C. 705.

(*b*) Hobbs v. Ferrars, 8 Dowl. 779; S. C. 4 Jur. 825.

(*c*) Charnley v. Winstanley, 5 East, 266; Bac. Arb. B. Baron & Feme, E.; Com. Dig. Arb. D. 5; M'Can v. O'Ferrall, 8 C. & F. 30; Andrews v. Palmer, 4 B. & A. 250; Saccum v. Norton, 2 Keb. 865, 877, 3 Keb. 9.

cation complete (*d*). If there be others joined with her as co-plaintiffs and co-defendants in the reference, her marriage avoids the submission as to all of them (*e*). But as it is a voluntary act on her part, it is a breach of her agreement to abide by and perform the award, and renders her and her husband liable to an action (*f*).

Change in character of arbitrator.

VII. *Revocation by the refusal to act, or death of the arbitrator.*]—A change in the character of the arbitrators does not of itself effect a termination of their authority. Where arbitrators were made by order of chancery commissioners to determine the controversy between the parties, they still retained the authority given them by the submission (*g*).

Arbitrator's refusal to proceed.

It has been decided in equity, by Lord Chancellor Eldon, that if the arbitrators refuse to proceed with a suit that has been referred to them, the suit may be prosecuted as if no reference had been made; and in giving judgment, Lord Eldon put it on the same footing as a case where one of the arbitrators had died (*h*).

Revocation by disagreement when there is an umpire.

When there are two arbitrators, and also an umpire, who is to decide in case of their disagreement, and no time is limited for making the award, the authority of the arbitrators will be terminated by their disagreement, and that of the umpire will commence (*i*).

Death of arbitrator a revocation.

The death of the arbitrator of necessity terminates his powers, defeating the submission, and opening the whole matter (*k*). That latter result may, however, be prevented

(*d*) Com. Dig. Arb. D. 5; White v. Gifford, Rolle. Ab. Auth. E. 4, p. 331; Vin. Ab. Authority, 1, 3.

(*e*) Com. Dig. Arb. D. 5; White v. Gifford, Rolle. Ab. Auth. E. 4, p. 331; Bac. Ab. Baron & Feme, E.

(*f*) Charnley v. Winstanley, 5 East. 266. See also Lambert v. Hutchinson, 2 M. & G. 858, where the point might have been raised.

(*g*) Hill v. Hill, Vin. Ab. Authority, I. 2.

(*h*) Crawshay v. Collins, 3 Swanst. 90.

(*i*) Tunno v. Bird, In re, 5 B. & Ad. 488. See P. 2, ch. 4, s. 4, d. 4, commencement of the umpire's authority.

(*k*) Crawshay v. Collins, 3 Swanst. 90; Cheslyn v. Dalby, 2 Y. & C. 170; Hooper v. Abrahams, 4 Moore, 3.

by the introduction of proper clauses into the submission, providing for the appointment of a new arbitrator in case of the decease of the first (*l*).

Death or refusal of one of several arbitrators.

If there be more than one arbitrator, the death of any one would, it is presumed, terminate the power of all, unless the submission expressly provided that the survivors might act alone (*m*). Possibly the refusal of one of several arbitrators to proceed with the reference might have the same effect, for the authority of arbitrators being derived from private individuals is different from that possessed by persons holding a public trust, and performing a public duty, and must be executed by all (*n*). At any rate, if it does not avoid the submission, it would be, it is apprehended, a good ground for revoking it.

Counties and Boroughs, death, &c., of barrister.

Provision is made in a recent statute, that in case the barrister who, pursuant to several statutes, is to be appointed to decide between counties and boroughs with regard to certain expenses of prisoners, should die, or refuse to act, or be disabled from acting before making his award, another is to be chosen, in the same manner as if no appointment had been made (*o*).

Death, &c. of arbitrator under the Lands and Railways Clauses Consolidation Acts.

By the clauses respecting arbitrations under "The Lands' Clauses Consolidation Act, 1845" (*p*), and "The Railways' Clauses Consolidation Act, 1845" (*q*), provision is made, that "if when a single arbitrator shall have been appointed, such arbitrator shall die, or become incapable to act before he shall have made his award, the matters referred to him shall be determined under the provisions of this or the

(*l*) See form of such clause in Jarman & Bythewood's Convey., vol. i. pp. 533, 619.

(*m*) Crawshay v. Collins, 3 Swanst. 90.

(*n*) R. v. Whitaker, 9 B. & C. 648; Grindley v. Barker, 1 B. & P. 229; R. v. Hobbes, Noy, 47; See Vin. Ab. Auth. B.; Doe d. Nicholson v. Middleton, 3 B. & B. 214.

(*o*) 7 & 8 Vic. c. 93, s. 2. See Appendix of Statutes.

(*p*) 8 & 9 Vic. c. 18, s. 29. See Appendix of Statutes.

(*q*) 8 & 9 Vic. c. 20, s. 130. See Appendix of Statutes.

special act, in the same manner as if such arbitrator had not been appointed."

When the parties have each appointed an arbitrator under either of the above statutes (*r*), if either arbitrator die or become incapable, the party who appointed him may appoint another in his place, and if he fail to do so within seven days after notice in writing, the remaining arbitrator may proceed ex parte; so if either arbitrator refuse, or for seven days neglect to act, the remaining arbitrator may proceed ex parte, and make an award (*s*).

Under the Companies' Clauses Consolidation Act.

Under "The Companies' Clauses Consolidation Act," the provisions are similar, except that in all the four events of death, incapacity, refusal, or neglect to act, the party has the option of appointing a new arbitrator within seven days after notice in writing (*t*)

Death of a party a revocation.

VIII. *Revocation by the death of a party.*]—Generally if either of two parties to a submission die before the award is made, the power of the arbitrator is wholly gone (*u*).

Other contracts in general retain their force against the property of a person after his death. But the rule with respect to submissions is otherwise, because the reasons are different.

A man who agrees to a reference may know that he is capable of giving explanations which his heir or persoual representative cannot give. He knows that if his opponent be examined as a witness, he may be examined also. He may therefore agree to bind himself to an arbitration, but not to bind those who are to succeed him (*x*). That this principle is founded on wisdom, is proved from its having

(*r*) 8 & 9 Vic. c. 18, ss. 26, 30. See Appendix of Statutes; 8 & 9 Vic. c. 20, ss. 127, 131. See Appendix of Statutes.

(*s*) See P. 2, ch. 4, s. 3, d. 3, as to proceedings by remaining arbitrator.

(*t*) 8 & 9 Vic. c. 16, s. 129. See Appendix of Statutes. See P. 2, ch. 4, s. 3, d. 3, as to proceedings by remaining arbitrator.

(*u*) Tyler v. Jones, 3 B. & C. 144.

(*x*) The President, &c., of Orphan Board v. Van Reenen, 1 Knapp. Pr. Council Rep. 83.

been adopted into the laws of England, Scotland (*y*) Spain (*z*), and into the civil law (*a*). The law of France indeed is not in exact accordance with the above, for it seems an arbitration in France is not stopped by the death of one of the parties, if his heir be of full age (*b*).

Whether death of one of several parties a revocation.

An exception to the universality of this rule, that death is a revocation, occurs where there are several parties on the same side. For it is very questionable as a general proposition of law, whether the death of one of them avoids an aftermade award (*c*). Where an action would not abate by reason of the death of one party, it seems probable that a reference of that action is not vacated by such death, but that the power of the arbitrator remains to bind the survivors, though not the representatives of the deceased (*d*).

Though verdict taken, death a revocation.

But the analogy of an action will not hold in every respect; for though the death of a single plaintiff or defendant after verdict will not abate an action, yet it has been often decided that taking a verdict on a submission at Nisi Prius does not prevent the death happening after it revoking it altogether (*e*), for the finding of the jury is a mere formal entry (*f*). This was held to be the effect of a death when the plaintiff died in the morning, and the award was executed in the evening of the same day (*g*). A distinction was taken in an older case, that death was a revocation when the submission at Nisi Prius embraced other matters than those to which the verdict could apply, but not when the cause only was referred ((*h*). That distinction, however, has been

(*y*) Erskine's Institutes, Book IV. tit. 3, sec. 16, 12th Ed.

(*z*) Johnson's Spanish Law, p. 295.

(*a*) Dig. lib. 4, tit. 8, l. 27; Domat. lib 1, tit. 14, s. 1, pt. 6.

(*b*) Code de Proc. Civ. P. 11. liv. 3, tit. unique, s. 1013.

(*c*) Hare & Milne, In re, 6 Bing. N. C. 158.

(*d*) Edmunds v. Cox, 2 Chitt. 432.

(*e*) Rhodes v. Haigh, 2 B. & C. 345; Cooper v. Johnson, 2 B. & A. 394.

(*f*) Toussaint v. Hartop, 1 Moore, 287, 7 Taunt. 571; Prentice v. Reed, 1 Taunt. 151.

(*g*) Potts v. Ward, 1 Marsh. 366.

(*h*) Bower v. Taylor, cited in Rhodes v. Haigh, 2 B. & C. 346; S. C. cited 7 Taunt. 574.

expressly overruled both in the Queen's Bench and Common Pleas (*h*).

Not when arbitrator to state a special case.

A distinction is taken as to the effect of death as a revocation, when the referee has to state a case instead of make an award. Where a cause was by order of Nisi Prius referred to a barrister, who was to state a special case, and the case was stated and delivered after the death of the defendant, the court refused to set it aside, for it was said if it had been the case of a special verdict, and one of the parties had died before the verdict was prepared, that would have made no difference; that the referee was a person put in the place of the judge to settle the points for the opinion of the court, and that if the referee had not been substituted, the judge might have proceeded to settle the case after the death of the parties (*i*).

Parties with several interests, death of one.

When one submission includes several parties on the same side, who have each of them separate interests, the death of one avoids the submission only as to him. Thus where the owners of a ship, and the several freighters, who had distinct interests in the cargo, submitted some differences which had arisen to arbitration, it was holden, that the death of one of the freighters before the award made, affected it only as to him, and was no revocation as to the others (*j*).

Death of infant revocation as to guardian.

In one instance the court practically treated the death of an infant as a revocation of a submission, so far as it affected parties who were his guardians and trustees. They had joined in a reference affecting lands, of which the infant was tenant for life. He died pending the reference. An award made against them after his death was, on application to the court, set aside so far as it related to them (*k*).

No relief in equity on revocation by death.

Nor can equity give any assistance, though a party deceased has covenanted for himself, his heirs, and executors, to convey lands at a price to be fixed by arbitration, and the

(*h*) Cooper v. Johnson, 2 B. & A. 394; Rhodes v. Haigh, 2 B. & C. 345; Toussaint v. Hartop, 7 Taunt. 571.

(*i*) James v. Crane, 3 D & L. 661.

(*j*) Reported 2 Archb. Practice, 1226, 7th Ed.

(*k*) Bristow v. Binns, 3 D. & R. 184.

arbitrators have executed their award, valid in every respect except that the covenantee died before it was made, for in order to ground an application for a specific performance, the terms of the contract must, unless otherwise provided, be ascertained by the arbitrator in the lifetime of the parties (*l*).

Clause to prevent death being a revocation.

To avoid the inconvenience which resulted from this rule of law, of death being a revocation, it was suggested by Lord Eldon that the contract might be framed so as to prevent its operation (*m*); and it was recommended by Lord Tenterden (*n*) that the parties should insert a clause in their submission providing that the death of either or any of them should not revoke the authority of the arbitrator, and that the award, in case of a death, should be delivered to the personal representative. Clauses to this effect have been generally adopted since, as they have been decided to be perfectly valid and efficacious to keep alive the authority of the arbitrator (*o*).

Usual form of the clause.

The usual clause runs thus: "That the award is to be delivered to the parties, or either of them, or if either of them should be dead before the making of the award, to their respective personal representatives requiring the same." From these words the law will imply a stipulation that the arbitrator's authority is not to be determined by a death, without there being any express provision to that effect (*p*).

Effect of the clause.

The clause in question amounts to an agreement that the personal representative shall pay any sum of money found due from the deceased either in his lifetime or after his death. The personal representatives, indeed, cannot be compelled to appear before the arbitrator, nor can the award be enforced by attachment against them; but the assets of the deceased are bound by this agreement as by any other simple contract (*q*); and the executors will be bound to

(*l*) Blundell v. Brettargh, 17 Ves. 232.

(*m*) Blundell v. Brettargh, 17 Ves. 232.

(*n*) Cooper v. Johnson, 2 B. & A. 394: Prior v. Hembrow, 8 M. & W. 873.

(*o*) M'Dougal v. Robertson, 4 Bing. 435; Dowse v. Coxe, 3 Bing. 20; S. C. 10 Moore, 272.

(*p*) Clarke v. Crofts, 4 Bing. 143; Lewis v. Winter, W. W. & D. 47.

(*q*) Lewin v. Holbrook, 2 Dowl. N. S. 991; Tyler v. Jones, 3 B. & C. 144; Dowse v. Coxe, 3 Bing. 20.

contribute to the costs of the reference and award which have been paid by a surviving party to the solicitor jointly employed by him and the deceased to conduct the reference on their behalf (*r*).

Enforcing award against survivors.

As against the surviving parties the award may generally be enforced by attachment. If, however, on the motion thus to enforce it, it can be made to appear to the court that the party called upon to perform the award has incurred any danger or lost any benefit by reason of the personal representative of the deceased party not having been brought before the arbitrators, in such case terms and conditions would probably be imposed by the court calculated to remove such danger or inconvenience; or the party would be left to his remedy by action on the award. But where the award is made in favour of the side of the deceased no such difficulty seems likely to occur (*s*).

Death no revocation under the Lands, Railways, and Companies' Clauses Acts.

It is provided in "The Lands' Clauses Consolidation Act, 1845" (*t*), "The Railways' Clauses Consolidation Act, 1845" (*u*), and "The Companies' Clauses Consolidation Act, 1845" (*x*), with respect of references under these acts, that after the appointment of an arbitrator by either party the death of either party shall not operate as a revocation.

(*r*) Prior v. Hembrow, 8 M. & W. 873.

(*s*) Hare & Milne, In re, 6 Bing. N. C. 158. See Wrightson v. Bywater, 3 M. & W. 199.

(*t*) 8 & 9 Vict. c. 18, s. 25. See Appendix of Statutes.

(*u*) 8 & 9 Vict. c. 20, s. 126. See Appendix of Statutes.

(*x*) 8 & 9 Vict. c. 16, s. 128. See Appendix of Statutes.

CHAPTER IV.

THE POWER AND DUTY OF THE ARBITRATOR BEFORE MAKING THE AWARD.

Scope and contents of the fourth chapter.

AN endeavour has been made to comprise in this chapter a consideration of the chief things an arbitrator either may do, or must do, in the fulfilment of his office, up to the time of making his award.

The first section treats largely of the powers to be exercised, and of the duties to be performed, by the arbitrator in the ordinary course of a reference, and also includes some provisions respecting the attendance of parties and witnesses before him.

The second section, after showing the arbitrator's want of power to delegate his authority to another, discusses how far he may take, and adopt as his own, a scientific opinion on matters of fact, or a legal opinion as to a point of law.

In the third section are laid down rules for the conduct of the case, when there are several arbitrators jointly called upon to act, instead of one only.

The fourth section concludes the chapter with a dissertation on the mode of appointment, and on the powers and dutes of an umpire.

SECTION I.

OF PROCEEDINGS IN THE REFERENCE.

Procuring and serving order of reference.

I. *Serving the submission on the arbitrator.*]—When a cause is referred at Nisi Prius, the attorney of one of the parties should get the order of Nisi Prius from the associate if the trial were at the assizes, or from the clerk of Nisi Prius in the Court of Queen's Bench, or the associate in the other courts if the cause were tried at the sittings at Nisi Prius in London or Middlesex (*a*). The order should be obtained and served on the arbitrator without any great delay, for the original time limited for making the award is often very short, and if it expire before the submission is served on the arbitrator, the reference would be entirely defeated (*b*), unless the court or a judge on special motion should be of opinion that they had power under the statute (*c*) to enlarge the time, and should think fit, in the exercise of their discretion, thus to remedy the neglect. The submission in general should be left with the arbitrator, as it is the document which authorizes his proceedings and defines his powers. He usually requires it, also, for the purpose of from time to time making the necessary indorsements on it. It is advisable, therefore, to take a copy of it before it is served.

Power of arbitrator to fix time and place of meetings.

II. *Power of the arbitrator to regulate the proceedings in the reference.*]—It lies entirely with the arbitrator to appoint the time and place of meeting for proceeding in the reference, and it is the duty of the parties to attend to his appointment (*d*). In general, soon after the submission is

(*a*) Arch. Pract. 1228, 7th Ed.
(*b*) Doe d. Fisher v. Saunders, 3 B. & Ad. 783.
(*c*) 3 & 4 W. IV. c. 42, s. 39.
(*d*) Fetherstone v. Cooper, 9 Ves. 67.

made, the party who wishes to go on with the reference will call upon the arbitrator, deliver to him the submission, and request him to appoint a meeting. It is usual to try to arrange some day by agreement that is convenient for all parties, but if such an arrangement cannot be made, and it be necessary for the arbitrator to make the appointment, he generally gives to the party applying for it a written appointment specifying the time and place at which the parties and their witnesses are to appear (*e*). The arbitrator ought not to fix on too early a day, considering that he must give the parties time to get up their proofs and collect their witnesses; nor, when either party is anxious to press on the case, ought he on light grounds to appoint a distant day, for delay in the decision often causes serious inconvenience to the party entitled to recover, and may amount even to practical injustice.

Serving appointment on opponent.

The party obtaining the written appointment should serve a copy of it on his opponent without delay, or at least within a reasonable time before the day of meeting.

Power of arbitrator to rescind appointment.

The arbitrator may revoke the appointment he has given if he shall think fit. If from any cause either party find that he will not be able, or that it will be very inconvenient for him to attend at the specified time, he should give timely notice of it both to his opponent and to the arbitrator; and the latter will in his discretion either insist on his attendance or put off the meeting and appoint another day.

The exercise of his discretion when reviewed by the court.

But the discretionary power of the arbitrator in the whole conduct of the case, though large, is by no means absolute, and his decision will be reviewed by the courts and his award set aside, if it be made to appear, that in the course he has pursued, he has acted, though with the best intentions, unfairly to either party. This subject is one we shall have occasion to notice repeatedly in the further pages of this chapter.

Notice of attendance by counsel.

The rule that next deserves mention affords an illustration of the preceding proposition. It is the duty of a party

(*e*) Forms of appointments are given in the Appendix of Forms.

who intends to employ counsel in the reference to give notice of his intention to his opponent previous to the meeting, in order that the latter may, if he pleases, provide himself with the like assistance. On an occasion where no such notice had been given, and one side appeared by counsel, and the other side complained of the want of notice, and begged for a postponement in consequence with a view to instruct counsel on his part, and the arbitrator refused to put off the meeting, the court held, that in refusing the request he had not performed his duty of acting fairly between the parties, and consequently annulled the award (*f*).

Power of arbitrator to say how reference to be conducted.

The mode in which the reference is to be conducted depends entirely upon the arbitrator. The courts will not review his discretion provided he acts according to the principles of justice, and behaves fairly to each party. Generally, the inquiry before an arbitrator is assimilated as near as may be to the course of a cause in the courts. But circumstances may arise in which, for the ends of justice, a different course should be adopted, and it has been said, may even justify the arbitrator in excluding the parties and their attorneys from the hearing, and in examining the witnesses himself in their own houses (*g*). But it is apprehended the circumstances must be very peculiar to authorize a proceeding at first sight so irregular.

Ordinary course of reference.

In the ordinary course, at the appointed time and place, the parties appear with their witnesses to support their respective cases. They are usually attended or represented by their attorneys or counsel, who conduct the proceedings on behalf of their respective clients.

On the reference of a cause at Nisi Prius, it is a common and convenient practice for the plaintiff's counsel to open his case very succinctly indeed, or to make no opening at all, and to proceed at once to sustain his case by proof, reserving his speech till the reply; for the arbitrator is commonly acquainted with the general case which each party

(*f*) Whatley v. Morland, 2 Dowl. 249.

(*g*) Hewlett v. Laycock, 2 C. & P. 574. See Matson v. Trower, 1 Ry. & M. 17.

proposes to set up, as it is usual, especially if the arbitrator request it, for the parties to leave their briefs with him beforehand. When the plaintiff's evidence is finished, the defendant, when he has a case of his own to prove, states the nature of his defence with like brevity, and produces the oral and documentary proof in support of it; after which he makes his address, summing up his own case, and commenting on that of the plaintiff's. If the defendant has no evidence to offer, he at once, at the close of the plaintiff's evidence, makes his speech in opposition to the plaintiff's claim. The plaintiff then has the reply, (or rather his turn to speak, as he has made no previous address,) and he then sets forth his own case fully and attacks his opponent's with such observations on the facts, and such arguments as to the points of law, as seem to him calculated to have weight with the arbitrator; and thus the case is closed on both sides.

Whether particulars of plaintiff's demand before arbitrator.

It seems that the particulars of the plaintiff's demand are not necessarily before the arbitrator, therefore if the plaintiff has not brought them before him, and the defendant seeks to restrict the plaintiff's claim to their amount, the defendant should himself produce them (*h*).

Arbitrator must perform condition precedent.

Before taking any step in the reference, it is advisable for the arbitrator to look carefully to the terms of the submission, to see if it contain any provision which makes the doing of any act a condition precedent to his entering upon the arbitration. As, for instance, if the agreement of reference direct that the arbitrator is to take a view of the premises, the subject of the dispute, a certain time before proceeding with the reference, he should take such view within the prescribed period, or it might afterwards be urged against the validity of the award, that he had not acted in pursuance of the powers entrusted to him (*i*).

Declaration under "The Lands and

Under "The Lands' Clauses Consolidation Act, 1845" (*k*), and "The Railways' Clauses Consolidation Act, 1845" (*l*),

(*h*) Kenrick v. Phillips, 9 Dowl. 308.

(*i*) Spence v. Eastern Counties Railway Company, 7 Dowl. 697.

(*k*) 8 & 9 Vict. c. 18, s. 33. See Appendix of Statutes.

(*l*) 8 & 9 Vict. c. 20, s. 134. See Appendix of Statutes.

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Railways' Clauses Acts," condition precedent.

before any arbitrator or umpire shall enter into the consideration of the matters referred to him, under the provisions of those Acts, he is to make and subscribe, in the presence of a justice, a solemn declaration in the form provided in the statutes that he will decide honestly and to the best of his ability. An umpire who was appointed on the 17th, and made his declaration on the 27th of the same month, before he entered on the matter referred, was held to have made it in due time (*l*).

When witness bound to attend.

III. *Enforcing the attendance of witnesses.*]—When a cause was referred by judge's order, or order of Nisi Prius, or rule of court, a witness was always bound to attend before the arbitrator (*m*), though before the recent statute the courts had no authority to make a specific order on the witness, enforcing his attendance (*n*). On references by other submissions, the attendance of the witness was purely voluntary (*o*).

Compulsory provision by 3&4 W.IV. c. 42. s. 40.

The defects in the law on this subject have been remedied as to the courts of law, though not as to the courts of equity (*p*), by the provisions of the late Act, 3 & 4 W. IV. c. 42, in the subjoined section (*q*).

Sec. 40. "And be it further enacted, that when any reference shall have been made by any such rule or order as aforesaid, [*i. e. by rule of court, or judge's order, or order of Nisi Prius in any action*] (*r*), or by any submission containing such agreement as aforesaid, [*i. e. that the submission shall be made a rule of any of his Majesty's courts of record*] (*s*), it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of

(*l*) Bradshaw v. E. & W. India Dock, &c., Railw. Cy. June 2, 1848.

(*m*) Webb v. Taylor, 1 D. & L. 676.

(*n*) Wansell v. Southwood, 4 M. & R. 359; Hall v. Ellis, 9 Sim. 530.

(*o*) Webb v. Taylor, 1 D. & L. 676.

(*p*) Hall v. Ellis, 9 Sim. 530.

(*q*) The Irish Act, 3 & 4 Vict. c. 105, s. 64, has like provisions.

(*r*) 3 & 4 W. IV. c. 42, s. 39.

(*s*) 3 & 4 W. IV. c. 42, s. 39.

any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if in addition to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses, and for loss of time, as for and upon attendance at any trial: provided, also, that the application made to such court or judge for such rule or order shall set forth the county where the witness is residing at the time, or satisfy such court or judge that such person cannot be found: provided, also, that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order."

Practice obtaining order for witnesses' attendance.

When it is necessary to resort to the compulsory process given by the statute, the order for the attendance of witnesses may be obtained, either upon motion in court on affidavits, or from a judge at chambers on an affidavit or memorandum signed by the solicitor of the party who requires the evidence. The affidavits or memorandum should set forth the existence of the reference, either shortly or by verifying a copy of the submission, the name of the witness, the county in which he is residing at the time, or if his residence be not known, should set out facts to satisfy the court that he cannot at present be found.

And production of documents.

If a document be required to be produced, it should be properly described as in a subpœna duces tecum. It should also be stated that the attendance of the witness or the production of the document is material. There should be annexed to the affidavit or memorandum, and verified by it, a copy of the written appointment by the arbitrator of the place of meeting and of the day or days (not exceeding two consecutively) on which

the witness is required to attend, or the effect of the appointment should be concisely stated in the affidavit or memorandum itself (*t*).

Rule absolute in first instance.

As the court, in granting an order for the attendance of witnesses, acts in a ministerial rather than in a judicial capacity, the rule is absolute in the first instance, when the order of reference has been made a rule of court (*u*).

Serving the rule or order.

When the judge's order or rule of court for the attendance of the witness is obtained, a copy of it, and also of the appointment, should be served upon the witness a reasonable time before the day fixed for the attendance, the originals being at the same time shown to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time. If the witness do not attend pursuant to the rule or order, he will be guilty of a contempt of court, and liable to an attachment (*x*).

Statute not extend to courts of equity.

The provisions of this statute do not apply to the courts of equity. For where application was made in Chancery to compel the attendance of some witnesses before an arbitrator to whom a suit had been referred by order of Chancery, the motion was refused by the Vice-Chancellor (Shadwell) on the ground that considering the preamble, and looking at the whole Act together, it must, with the exception of one single isolated section, be taken as having reference to courts of law only; and the submissions to arbitration mentioned in sections 39, 40, 41, must be deemed to have reference solely to courts of law; consequently, that the Court of Chancery, as a court of equity, could not interfere, especially as the subject of the particular reference was not one cognizable on the common law side of that court (*y*).

Order of Nisi Prius not drawn up.

The court or a judge has no authority under this section to make an order for the attendance of witnesses when the submission is on a verdict taken at Nisi Prius, but no order

(*t*) Jarman & Bythewood, Convey. vol. 3, p. 59, 3rd Ed.; Archb. Pract. 1229, 7th Ed. See the Appendix of Forms for the forms of the affidavit and memorandum.

(*u*) Guarantee Society & Levy, In re, 1 D. & L. 907.

(*x*) Archb. Pract. 1229, 7th Ed.

(*y*) Hall v. Ellis, 9 Sim. 530.

of Nisi Prius has been drawn up (*z*); or when it is by deed, which does not contain a consent clause for making it a rule of court within the 9 & 10 W. III. c. 15; and if an order has been made in such cases the court will set it aside on the motion of a party to the submission, although the witnesses themselves do not make any application to have it rescinded (*a*).

No consent clause in submission.

The above section applies only to witnesses, and not to parties to the submission, when called upon to produce documents. Over the latter, however, when the submission is made a rule of court, the court in general possesses authority independently of the statute, by virtue of the parties' own agreement in the submission to produce all documents (*b*).

Statute not apply to the parties.

IV. *Parties attending the arbitrator privileged from arrest.*]—The power of compelling the attendance of witnesses gives to the proceedings of an arbitrator, even though no action is pending, a judicial character, and protects the parties, the attorneys, and the witnesses appearing before him from arrest, eundo morando et redeundo, in the same manner as on a trial at law (*c*). But there is no protection in cases not within the statute, where the witness could not be compelled to attend. A voluntary attendance, however, when the attendance might be enforced, does not deprive him of his privilege (*d*).

Parties, attorneys, and witnesses privileged from arrest.

The protection extends during the adjournment of an arbitration from one period to another of the same day, or when the adjournment is from day to day, but not when many days are to elapse before the next meeting (*e*).

How far privileged during adjournments.

(*z*) Curtis v. Bligh, 3 Jur. 1152.
(*a*) Woodcroft & Jones, In re, 9 Dowl. 538.
(*b*) Arbuckle v. Price, 4 Dowl. 174.
(*c*) Webb v. Taylor, 1 D. & L. 676: Spence v. Stuart, 3 East, 89; Randal v. Gurney, 3 B. & A. 252; S. C. 1 Chitt. Rep. 679; Ricketts v. Gurney, 7 Price, 699; S. C. 1 Chitt. Rep. 682; Moore v. Booth, 3 Ves. 350.
(*d*) Webb v. Taylor, 1 D. & L. 676.
(*e*) Spencer v. Newton, 6 A. & E. 623; Temple, Ex parte, 2 V. & B. 395; Russell, Ex parte, 1 Rose, 278.

PART II. CH. IV. S. 1.

When examination on oath requisite.

v. *Examination of the witnesses on oath.*]—Most orders of reference require that the witnesses shall give their evidence on oath. When such is the case, the arbitrator is not at liberty to receive testimony given without that sanction, except by consent of the parties (*f*). By not persisting at the time of examination in requiring that the witness should be sworn, a party will be taken to have assented to the omission of the oath. Even where the defendant objected that a witness tendered by the plaintiff could not be examined as he had not been sworn before a judge, but the objection being overruled by the arbitrator, afterwards called witnesses in answer who gave their testimony unsworn, he was taken not only to have waived any right to object, but to have acquiesced in the course pursued (*g*).

When discretionary.

If the submission run, that the arbitrator "shall be at liberty, if he shall think fit, to examine the parties and their respective witnesses on oath," it is left to the option of the arbitrator whether he will examine them on oath or not, although one of the parties require the witnesses to be sworn (*h*).

Old practice swearing the witnesses.

Before the court or a judge.

As before the recent statute (*i*) the arbitrator had no power to administer an oath (*k*), it was usual, when a cause was referred at Nisi Prius, and the witnesses were in court, for each attorney to write down the names of his witnesses, together with the name of the cause, upon a piece of paper, and give it to the crier of the court, who would thereupon swear the witnesses. In other cases, when the submission contained a clause for making it a rule of court, or when the reference was by rule of court, or judge's order, a similar list was made out, stating also whether the persons to be sworn were parties or only witnesses. It was taken to the judge's chambers, or to the court at Westminster, and the

(*f*) Ridoat v. Pye, 1 B. & P. 91.

(*g*) Allen v. Francis, 9 Jur, 691; S. C. 4 D. & L. 607, n.; Smith v. Sparrow, 16 L. J., Q. B. 139; S. C. 4 D. & L. 604.

(*h*) Smith v. Goff, 3 D. & L. 47.

(*i*) 3 & 4 W. IV. c. 42, s. 41.

(*k*) Street v. Rigby, 6 Ves. 815; Wellington v. M'Intosh, 2 Atk. 569; Halfhide v. Fenning, 2 Bro. C. C. 336.

judge's clerk had the witnesses sworn, and gave a memorandum to that effect signed by the judge (*l*).

Not before commissioner for taking affidavits.

It should be observed, that witnesses who are to give vivâ voce evidence before the arbitrator cannot be sworn before a commissioner for taking affidavits, even when the submission by judge's order provides for their being sworn before a judge or *before a commissioner duly authorized.* Such a submission under the old law would not warrant the arbitrator, when himself a commissioner for taking affidavits to administer an oath to the witnesses. It is very doubtful if the Court of Queen's Bench has any power, in an order of reference, to authorize their commissioners for taking affidavits to swear the witnesses on an arbitration (*m*).

Arbitrator empowered by stat. 3 & 4 W. IV. c. 42, s. 41.

The course above pointed out as the old practice may still be pursued; though it is not necessary, since the stat. 3 & 4 W. IV. c. 42, s. 41, which enacts, "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator, or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

The more usual and convenient course now is, to have the witnesses sworn before the arbitrator at the meeting at which they attend to give their evidence.

Concurrent power of court and arbitrator.

The power given by the statute is not taken away by a clause in the submission ordering that the witnesses shall be

(*l*) Archbold's Practice, vol. 2, p. 1227, 7th Ed.

(*m*) R. v. Hanks, 3 C. & P. 419; R. v. Norman, 1 Wils. 7.

sworn before a judge or commissioners; for unless the submission is distinctly restrictive the arbitrator retains a concurrent jurisdiction to administer the oath (*n*).

Swearing witnesses under the Lands, Railways, and Companies' Clauses Acts.

By the enactments of "The Lands' Clauses Consolidation Act, 1845" (*o*), "The Railways' Clauses Consolidation Act, 1845" (*p*), and "The Companies' Clauses Consolidation Act, 1845" (*q*), arbitrators or umpires appointed under those statutes "may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

No particular form of words is necessary to make the oath good in law (*r*).

Evidence by affidavits, when admissible.

In the case of an ordinary reference, if the submission provide "so that the witnesses be examined on oath," the award will be set aside if affidavits be read (*s*). It may here properly be noticed that when a cause or other matter is referred by rule of court to the master, he is authorized to receive affidavits only, and not vivâ voce evidence, unless the court specially empower him so to do (*t*).

Arbitrator should hear all the evidence.

VI. *Duty of the arbitrator to hear the evidence.*]—The arbitrator should hear all the evidence material to the question which the parties choose to lay before him, as on a trial before a jury. It is said he may exercise some discretion as to the quantity of evidence he will hear (*u*); but declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award (*x*).

(*n*) Hodsoll v. Wise, 4 M. & W. 536; S. C. Sub nomine Hodson v. Wilde, 7 Dowl. 15; James v. Attwood, 5 Bing. N. C. 628.

(*o*) 8 & 9 Vict. c. 18, s. 32. See the Appendix of Statutes.

(*p*) 8 & 9 Vict. c. 20, s. 133. See Appendix of Statutes.

(*q*) 8 & 9 Vict. c. 16, s. 132. See Appendix of Statutes.

(*r*) See the forms of oaths and affirmations in the Appendix of Forms.

(*s*) Banks v. Banks, 1 Gale, 46.

(*t*) Noy v. Reynolds, 4 N. & M. 483.

(*u*) Nickalls v. Warren, 6 Q. B. 615; per Ld. Denman, C. J. 618.

(*x*) Johnston v. Cheape, 5 Dow. 247.

In order that the above statement may not give rise to any misconception, it may here be proper to call attention to the wide distinction in principle between refusing to hear evidence on any particular matter, and rejecting a piece of evidence deemed by the arbitrator inadmissible, for we shall see further on, that the exercise of the arbitrator's judgment in receiving or rejecting evidence according to his opinion as to its admissibility is not open to review (*y*).

Evidence must be tendered.

In order to make out a case entitling the party to impeach the award, the witnesses must be distinctly tendered to the arbitrator for hearing. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence (*z*).

Awarding without hearing evidence.

If an arbitrator to whom an action for not repairing a house has been referred, make his award on a view of the premises without calling the parties before him, the court will set aside the award; for though the premises may almost tell their own tale, yet there may be other facts which ought to be inquired into, such as payments by the party, or excuses for not repairing (*a*).

Hearing one side only.

Still less can an award stand where the arbitrator hears one side only (*b*). A coachmaker to whom it was referred to determine whether a phaeton was built in accordance with a contract, after inspection of the phaeton refused to examine the witnesses tendered by the plaintiff, though he heard the defendant's witnesses. He was held bound to have received the testimony of the plaintiff's witnesses, however little he might have thought that their evidence would make him alter the opinion he had formed by the inspection (*c*).

Even when the refusal to hear one side is not wilful, the award will be bad. For where the arbitrator thought it necessary before decision to have the admission of the par-

(*y*) See P. 2, ch. 4, s. 1, d. 12.

(*z*) Craven v. Craven, 7 Taunt. 644; Grazebrook v. Davis, 5 B. & C. 534.

(*a*) Anon. 2 Chitt. Rep. 44.

(*b*) Braddick v. Thompson, 8 East, 344.

(*c*) Phipps v. Ingram, 3 Dowl. 669.

ties in writing that they had nothing further to offer, and that they desired a decision on the case as it stood, and was led to believe that a letter to that effect, signed by all the parties, was in the hands of the clerk to the submission, (the reference being on a Scotch submission,) and stated on the face of the award that he had considered that letter, and it afterwards appeared that one of the parties had made no such admission, and had signed no such letter, and had material evidence still to produce, and on that account applied to the court to have that award set aside; it was held by the House of Lords reversing the decision of the Court of Session that the award ought not to stand, and Lord Eldon said, "By the great principles of eternal justice, which is prior to all these acts of sederunt, regulations, and proceedings of court, it is impossible that an award can stand where the arbitrator hears one party and refuses to hear the other (*d*).

When arbitrator may refuse to hear evidence.

But when the submission recited that the arbitrator was appointed on account of his skill and knowledge of the subject, and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support by proof, the House of Lords held the arbitrator justified in refusing to receive it, if, taking all the matters alleged to be facts into consideration, yet having his own local knowledge to guide him, and all the circumstances in his view, he felt that such facts would have no effect upon his determination (*e*).

Rejecting evidence of want of assets.

On a general reference by an executor respecting differences between his testator and a third person, an arbitrator is not justified in rejecting evidence offered by the executor to show that he has no assets to meet the demand upon his testator's estate (*f*).

Misleading party, awarding before case closed.

The arbitrator should be careful not to mislead the parties into a supposition that the case is still open, and then unexpectedly to make his award. For if the arbitrator, after

(*d*) Sharpe v. Bickerdyke, 3 Dow. 102.

(*e*) Johnston v. Cheape, 5 Dow. 247.

(*f*) Riddell v. Sutton, 5 Bing. 200.

promising to hear some witnesses, make his award without calling them, or giving notice that he shall not examine them (*g*); or if, after declaring that he can take no further proceedings in the reference till some books of account have been looked into and examined, make his award without giving notice to the parties that he has found the inspection of the books unnecessary (*h*), the award will be set aside.

Closing case too hastily.

If, though there has been some needless delay, an arbitrator does not give the party who has caused it proper opportunity to go into his case, but makes his award too hastily, without giving the party due notice of his intention to do so, the court will set the award aside (*i*). Where a party desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him, as this was within two or three days before the time for making the award was out, the arbitrator refused his request, and made his award, yet as it seemed there was a just ground for the plaintiff's desire to be heard, though it did not appear the plaintiff was ready to be heard within the time, the court set aside the award (*k*).

Refusing to re-open it.

But where it was agreed that a certain meeting should be the last, and that all the evidence on both sides should be produced, and the defendant afterwards applied to the arbitrator for another hearing, alleging that he was in possession of fresh evidence to rebut the effect of certain accounts put in evidence by the plaintiff at the last meeting, and the arbitrator refused the hearing, and made his award without any more evidence, the court declined to interfere, saying that the arbitrator must use his own discretion whether he would grant another meeting or not (*l*).

Arbitrator should take notes of the evidence.

As a general practice, the arbitrator should carefully take notes in writing of everything material stated by the wit-

(*g*) Earle v. Stocker, 2 Vern. 251.

(*h*) Pepper v. Gorham, 4 Moore, 148.

(*i*) Doddington v. Hudson, 1 Bing. 384; Gladwin v. Chilcote, 9 Dowl. 550; Bedington v. Southall, 4 Price, 232.

(*k*) Spettigue v. Carpenter, 3 P. W. 361.

(*l*) Ringer v. Joyce, 1 Marsh. 404. See Hall v. Anderton, In re, 8 Dowl. 326.

nesses, in order that he may be enabled to do full justice between the parties, by going over the whole collectively and deliberately, by accurately comparing what a witness says at first with what he admits on cross examination, and what one witness states with what a second witness deposes to. Even if the case is so short that the arbitrator can safely trust to carrying all the evidence in his head, it is advisable that there should be written minutes of the evidence in case any ulterior proceeding be taken on the award, and the arbitrator be required to give information respecting the proceedings before him.

Examining party as witness.

VII. *Power of the arbitrator to examine the parties.*]—The arbitrator is often empowered by the submission to examine the parties themselves on oath. Indeed, in many cases justice cannot be attained without it. Where he has power to examine the parties, it was decided in an old case that he might waive an objection taken to the competence of a witness that he had such an interest that he ought to have been made a party to the cause referred (*m*).

Whether arbitrator has implied power to receive party's evidence.

It does not seem that there is any express decision as to the power of the arbitrator to allow a party to give evidence as a witness in support of his own case, when the submission is silent on the subject, and the opponent objects to his testimony being received; Wightman, J., however, expressed an opinion that receiving his evidence in such a case would be objectionable on principle, and an excess of authority in the arbitrator, especially where, as in the case before him, the opponent was an executor, and not likely to be personally cognizant of the transactions on which the claims against his testator's estate, the subject of the reference, were founded. He did not, however, feel called upon then to decide the point, as before the reference was entered into the defendant, the executor, had expressly refused to allow the plaintiff to be examined, and the usual clause

(*m*) Lloyd v. Archbowle, 2 Taunt. 323.

empowering the arbitrator to examine the parties had, in consequence, been by consent struck out of the order of reference. Notwithstanding this, the plaintiff tendered himself as a witness to prove his own case, and though objected to by the defendant, was received by the arbitrator, who conceived that he had a discretionary power of examining the parties, as the order of reference did not prohibit such a course. Under these circumstances, Wightman, J., held that as it was clear the defendant never would have consented to the reference, had he not concluded that the plaintiff would not be examined, the examining the plaintiff in his own favor was such a fraud on the defendant, as to entitle him to have the award based on such evidence set aside, and that the defendant had not waived his right to object, by cross-examining the plaintiff with a view to prove a set-off, when despite his protest the arbitrator had allowed the plaintiff to give evidence. But, he added, had the defendant tendered himself for examination, he should have taken that to have been such an acquiescence in the course pursued, as would have disqualified him from relying on the admission of the plaintiff's testimony as an objection to the award (*n*).

Examining party contrary to good faith.

If the submission, as is usual, provide that the arbitrator shall have power to examine the parties "*if he shall think fit*," a party cannot compel the arbitrator to receive his evidence (*o*). For the arbitrator has a general discretion as to whether he will examine either or both of the parties, and as to what parts of the case he will confine their evidence, whether he will allow them to be witnesses in their own favour to support their own case, or whether he will make the reference a substitute for a bill of discovery, and examine them only so far as to compel them to admit the truth in favour of their opponents (*p*).

Extent of examination discretionary with arbitrator.

(*n*) Smith v. Sparrow, 16 L. J., Q. B. 139; S. C. 4 D. & L. 604.
(*o*) Scales v. East London Waterworks, 1 Hodges, 91.
(*p*) Wells v. Benskin, 9 M. & W. 45; Morgan v. Morgan, 1 Dowl. 611; Keene v. Deeble, 3 B. & C. 491; Warne v. Bryant, 3 B. & C. 590; Morgan v. Williams, 2 Dowl. 123.

In practice many cases are referred for the express purpose of having the parties to the suit examined, which cannot be done in a court of law (*q*). If a transaction take place between the parties alone, it is often obvious that they must be examined, in order to obtain any evidence respecting it. But if other persons were present, who are not called before the arbitrator, it is very dangerous to allow a party's own statement to supply the want of their evidence. In order, therefore, to compel a party to exhaust all other means of proof, it has been recommended, that when application is made to the arbitrator to allow a party to give evidence in his own favour, not to decide at once whether he will receive his testimony, but to say that he will decide when the applicant shall have closed his case entirely. The keeping him in uncertainty will compel him to call all his witnesses, and thus prevent his substituting his own biassed statement for the evidence of a more impartial witness, who might give a different colour to the transaction in question.

Advisable not to examine a party till his case is closed.

By the special provisions of The Lands' Clauses Consolidation Act, 1845 (*r*), The Railways' Clauses Consolidation Act, 1845 (*s*), and The Companies' Clauses Consolidation Act, 1845 (*t*), the arbitrators or umpire, on references under those acts, have power to examine the parties on oath, and may administer the oath for that purpose.

Examining parties under the Lands, Railways, and Companies' Clauses Acts.

VIII. *Power of the arbitrator to call for documents.*]—A provision is generally inserted in orders of reference, that the parties shall produce before the arbitrator all books, papers, deeds, and writings, relating to the matters in difference between them, as the arbitrator shall require. Compliance with the arbitrator's demand for production will be enforced by attachment (*u*).

Calling for documents.

(*q*) Warne v. Bryant, 3 B. & C. 590.

(*r*) 8 & 9 Vic. c. 18, s. 32. See Appendix of Statutes.

(*s*) 8 & 9 Vic. c. 20, s. 133. See Appendix of Statutes.

(*t*) 8 & 9 Vic. c. 16, s. 132. See Appendix of Statutes.

(*u*) Arbuckle v. Price, 4 Dowl. 174.

If on a general reference the arbitrator call for certain books of account, it is no answer for the party who is ordered to produce them, to say that they relate to accounts long since settled, and not now matters in dispute, for the arbitrator is for this purpose to determine what are the matters in dispute (*x*).

Arbitrator calling for accounts to decide what are matters in difference.

In references under "The Lands' Clauses Consolidation Act, 1845" (*y*), "The Railways' Clauses Consolidation Act, 1845" (*z*), and "The Companies' Clauses Consolidation Act, 1845" (*a*), the arbitrators, or the umpire, are empowered to call for the production of any documents in the possession or power of either party, which he or they may think necessary for determining the question in dispute.

Power under the Lands, Railways, and Companies' Clauses Acts.

IX. *Duty of the arbitrator to receive no evidence unless both parties are present.*]—An arbitrator can hardly be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to, and capable of being met and resisted by the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him, without giving information of it to the other side (*b*).

Arbitrator should not receive private statement from a party.

Except in the few cases where exceptions are unavoidable, as where the arbitrator is justified in proceeding ex parte, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a

Should examine witness in presence of both parties.

(*x*) Arbuckle v. Price, 4 Dowl. 174.

(*y*) 8 & 9 Vic. c. 18, s. 32. See Appendix of Statutes.

(*z*) 8 & 9 Vic. c. 20, s. 133. See Appendix of Statutes.

(*a*) 8 & 9 Vic. c. 16, s. 132. See Appendix of Statutes.

(*b*) Harvey v. Shelton, 7 Beav. 455; S. C. 13 L. J., Ch. 466.

party or a witness upon it, except in the presence of the opponent.

Irregular examination avoids award.

The smallest irregularity in this respect is often fatal to the award (*c*). Where some witnesses attended before the arbitrator to give evidence on behalf of the defendant, and he, notwithstanding the parties, pursuant to his recommendation, had agreed to produce no more evidence, received the testimony of these witnesses, the parties and solicitors on both sides being absent, Lord Eldon set aside the award, on the ground that the evidence had been improperly admitted, although the arbitrator swore that the evidence thus received had had no effect on his award (*d*), the learned judge being of opinion that no court should permit an arbitrator to decide so delicate a matter, as whether a witness examined in the absence of one of the parties had an influence on him or not (*e*).

Held in C. P. only when party in fault.

But this rule has not always been strictly adhered to, for in two instances it has been held by the Court of Common Pleas, that if the arbitrator re-examined a witness after the case on both sides was closed, and the plaintiff's attorney gone away, that circumstance would not induce the court to set aside the award, although the arbitrator admitted his judgment had been influenced by the answer, unless it appeared that the second examination of the witness was brought about by the management of the opposite party (*f*).

Held in Q. B. though party not in fault.

In a very recent case, however, the Court of Queen's Bench stated that the two cases in the Common Pleas were not satisfactory to them, and that they would rather abide by the broad principle laid down by Lord Eldon in *Walker* v. *Frobisher* (*g*), and reiterated in *Fetherstone* v. *Cooper* (*h*).

In that case, one party had brought an action for obstructing the waterway in front of their houses, which faced on to the river Thames. The obstruction complained of con-

(*c*) Harvey v. Shelton, 7 Beav. 455; S. C. 13 L. J., Ch. 466; Hick, In re, 8 Taunt. 694.

(*d*) Walker v. Frobisher, 6 Ves. 70.

(*e*) Fetherstone v. Cooper, 9 Ves. 67.

(*f*) Atkinson v. Abraham, 1 B. & P. 175; Bignall v. Gale, 2 M. & G. 830.

(*g*) 6 Ves. 70.

(*h*) 9 Ves. 67.

sisted of a floating pier composed of barges. The other party indicted the former for a nuisance, alleging that an embankment in front of the house was an encroachment on the river. Both the action and indictment were, by different orders of reference, referred to the same arbitrator, with power to order the removal of obstructions, and to regulate the waterway. After the arbitrator had heard the case, and stated that he wanted nothing further from either party, he sent for the deputy water-bailiff, who had been examined as a witness, and questioned him as to the means of giving convenient access to the shore, supposing the embankment removed. No notice of this meeting was given to either side, but a special pleader was present at it, who had acted as an advocate for one of the parties in a former stage of the reference. One of the other party coming accidentally into the room, asked permission to remain also, but this the arbitrator refused, saying that he had the special pleader there to give him some information, by which, however, his opinion would not be biassed.

The court said, that though there was no imputation on the motives of the arbitrator, the irregularity of his conduct was fatal to the validity of the award; that they could draw no line, but must abide by the general principle, that where by possibility the arbitrator's mind may have been biassed, the objection is fatal; and that they must oppose all attempts to explain, by the bearing of particular parcels of the evidence, whether the inquiry had, or by any probability might have had, an effect on the decision; and as there was only one subject-matter, they set aside the award, both upon the indictment, as well as upon the action (*i*).

On a later occasion, when the cases in the Common Pleas, above referred to (*k*), were relied on in the Queen's Bench, Lord Denman again intimated that that court did not accede to their authority, and that they had in preference adopted the

(*i*) Dobson v. Groves, 6 Q. B. 637.

(*k*) Bignall v. Gale, 2 M. & G. 830; Atkinson v. Abraham, 1 B. & P. 175.

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rule laid down by Lord Eldon at the commencement of his career (*l*).

Examining witness when both parties absent.

Though both the parties are absent, and are thus in a measure on an equality, the course of examining a witness in private cannot, under ordinary circumstances, be justified (*m*).

Examining one party in private bad on public grounds.

The Court of Chancery also has recently exhibited its adherence to the rule laid down by Lord Eldon (*n*). For where the arbitrator summoned one of the parties before him, to explain an apparent error in the accounts, without giving any notice of the meeting to the other side, even though the meeting took place in the presence of an accountant employed by both sides, the Master of the Rolls held that this was such a deviation from the course of justice, that the award could not be supported, although it did not appear that the party excluded had in fact been injured; and that the absent party was not precluded from objecting to this irregularity, by reason of his having himself been guilty of the impropriety of privately communicating with the arbitrator, because it was not a question of mere private consideration between two adverse parties, but a matter concerning the due administration of justice (*o*).

No exception in case of merchant arbitrator.

This course of conduct, so fatal to the award of examining one party in the absence of the other, seems to have prevailed as a practice among mercantile arbitrators (*p*). But the court, in the above instance, strongly repudiated the idea that a different course is allowable in the case of mercantile referees, than is prescribed to all other arbitrators (*q*).

Inquiry whether party admits or disputes items.

Notwithstanding the necessity of avoiding in general anything like ex parte proceedings, it has been decided by the House of Lords to be no objection to the award, if the arbi-

(*l*) Plews v. Middleton, 6 Q. B. 845.

(*m*) Plews v. Middleton, 6 Q. B. 845.

(*n*) Fetherstone v. Cooper, 9 Ves. 67.

(*o*) Harvey v. Shelton, 13 L. J., Ch. 466; S. C. 7 Beav. 455.

(*p*) Matson v. Trower, 1 Ry. & Moo. 17.

(*q*) Harvey v. Shelton, 7 Beav. 455; S. C. 13 L. J., Ch. 466.

trator, in the absence of one of the parties, call in the other, and ask him whether he admits or disputes certain items in an account, and merely take his answer to that question (*r*).

Private statements to accountant.

If on a reference it is arranged that the accounts should be referred to an accountant, and that either party is to be at liberty to examine the books in his presence, it does not seem objectionable for either party, when attending separately before the accountant, to give explanations respecting the items, for the accountant is not the judge, but only an assistant of the arbitrator on the occasion (*s*).

Private meeting, nothing done in the reference.

Though we have seen that in general serious objections may be made to the proceedings, if a meeting takes place of which one of the parties has no notice, yet if at a meeting so held, nothing is done except to discuss the question of adjournment, and the meeting is in fact adjourned without the subjects of the reference being entered upon, the court, it seems, will not set aside the award on the mere ground of the party having had no notice of such a meeting being held (*t*).

Parties may waive irregularity.

x. *Waiving objection to irregular conduct of the arbitrator.*]—Though the arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such, as shows that they waive any objection on account of it; but the waiver must be clearly made out (*u*).

Improper enlargement of time.

If by the terms of the submission the arbitrators are to appoint an umpire previous to entering on a consideration of the matters referred, and they enlarge the time for making the award before they appoint an umpire, and the parties, with knowledge of these facts, attend a meeting before the arbitrators, they will be taken to have waived the objection as to the irregular enlargement of the time (*x*).

(*r*) Anderson v. Wallace, 3 C. & F. 26.

(*s*) Harvey v. Shelton, 7 Beav. 455.

(*t*) Morphett, In re, 2 D. & L. 967.

(*u*) Salkeld, In re, 12 A. & E. 767: Jenkins, In re, 1 Dowl. N. S. 276.

(*x*) Hick, In re, 8 Taunt. 694.

Improper appointment of umpire.

Even if the arbitrator, without any authority, appoint an umpire, and he is guilty of the irregularity of examining the parties separately, his decision cannot be impeached by them, if they attend before him and make no objection (*y*).

Private examination of witnesses.

So also it was held, that where the arbitrators excluded the parties and their attorneys, and examined witnesses privately, if either party intended to take advantage of it, he ought to have given notice at the time that he intended to rely on it as an objection (*z*).

Irregular meeting.

So if at a meeting improperly convened, and in the absence of both parties, the arbitrators receive evidence, which they strike out on its being objected to at the next meeting, a party will not be permitted to invalidate the award on the ground of the reception of evidence in an irregular manner, if afterwards he has gone on with the case, examining and cross-examining the witnesses (*a*).

Waiver by lying by without objecting.

An objection to an award, on the ground of irregular and improper conduct on the part of the arbitrators in examining witnesses ex parte, it has been held by the Court of Common Pleas, may be waived, by the injured party knowing of their conduct for three weeks before the award is made, without taking any objection; for he has no right to lie by and take his chance of the award, and then finding that made against him, move to set it aside on the ground of the irregularity (*b*).

The Court of Queen's Bench, however, have lately taken this distinction, that where an irregularity takes place at a meeting of all the parties, and is passed over, no objection can afterwards be made, but that where witnesses have been examined behind the back of one of the parties who wishes to be present, as the opportunity of setting right what was irregular is past, he will not be taken to have waived his right to complain, merely because, with a knowledge of the circumstance, he has not protested before the award is made (*c*).

(*y*) Matson v. Trower, 1 Ry. & Moo. 17.

(*z*) Hewlett v. Laycock, 2 C. & P. 574.

(*a*) Kingwell v. Elliott, 7 Dowl. 423.

(*b*) Bignall v. Gale, 2 M. & G. 830.

(*c*) Dobson v. Groves, 6 Q. B. 637.

Arbitrator's course to cure an irregularity.

The result of the above cases seems to show that if the arbitrator find that he has inadvertently been betrayed into an irregularity, which, though fatal on principle, yet in fact does not affect the merits of the case, he may generally prevent any ill consequences by giving the parties full information of the particular step, and proposing to adopt such a course as may seem fit to remedy any possible inconvenience. It will rarely happen that the parties will not either expressly or impliedly agree to waive any objection that might otherwise be taken.

Power to proceed ex parte for cause implied.

XI. *When arbitrator empowered to proceed ex parte.*]— Every arbitrator is authorized, by the nature of his office, to proceed ex parte for good cause. It is unnecessary, though not unusual, to give him the power in express terms in the submission. No application to the court is necessary to warrant his so proceeding, but the arbitrator is to judge for himself of the discretion of exercising his power (*d*).

It ought, however, to be a very strong case to justify him proceeding ex parte, as going on with the reference in the absence of one of the parties is so substantial an inconvenience, and so much prevents the doing justice between them (*e*).

Party neglecting to attend.

Still if one of the parties, after having been duly summoned, neglect to attend before the arbitrator, and the latter be of opinion, from the circumstances which are brought before his notice, that the party absents himself with a view to prevent justice, and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absenting party, that he intends, at a specified time and place, to proceed with the reference, whether the party shall attend or not. If this notice fail to enforce his attendance, and he do not allege some excuse satisfactory to the arbitrator, the latter not only may, but ought to proceed ex parte (*f*).

(*d*) Wood v. Leake, 12 Ves. 412; Hetley v. Hetley, Kyd on Awards, 100.

(*e*) Gladwin v. Chilcote, 9 Dowl. 550.

(*f*) Waller v. King, 9 Mod. 63; Wood v. Leake, 12 Ves. 412; Hall v. Anderton, In re, 8 Dowl. 326.

Party attempting to revoke.

When a party has ineffectually attempted to revoke the submission, and refused to attend a meeting on the ground that the arbitrator has no authority, it has long been decided that the arbitrator may proceed ex parte at once (*g*). In order to clear away all doubts on this point, if any existed, the recent statute 3 & 4 W. IV. c. 42, expressly provides in s. 39, that notwithstanding any attempted revocation, the arbitrator is to proceed and to make his award, "although the person making such revocation shall not afterwards attend the reference."

Notice of intention to proceed ex parte.

In general the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. The notice may be given verbally or in writing. It should express the arbitrator's intention clearly, or the award may be set aside (*h*). An ordinary appointment for a meeting, with the addition of the word "peremptory" marked on it, is sufficient (*i*). If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorized in proceeding ex parte at the second meeting, unless the appointment for it also is marked peremptory, or contains a similar intimation of his intentions (*k*).

Peremptory notice for each meeting.

Whether notice requisite when authority denied.

If a party says, "I will not attend because you the arbitrator, are receiving illegal evidence, and no award which you can make will be good," the arbitrator may go on with the reference in his absence; and it seems it is not necessary to give the recusant any notice of the subsequent meetings. But though it may not always be necessary, it certainly is advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases (*l*).

(*g*) Harcourt v. Ramsbottom, 1 J. & W. 512.

(*h*) Gladwin v. Chilcote, 9 Dowl. 550; Scott v. Van Sandau, 6 Q. B. 237.

(*i*) Gladwin v. Chilcote, 9 Dowl. 550; Doddington v. Hudson, 1 Bing. 384.

(*k*) Gladwin v. Chilcote, 9 Dowl. 550.

(*l*) Scott v. Van Sandau, 6 Q. B. 237; Harcourt v. Ramsbottom, 1 J. & W. 512; Bignall v. Gale, 2 M. & G. 830; Kyle, In re, 2 Jur. 760.

XII. *Duty of the arbitrator in deciding points of evidence.*] —Questions relating to the admissibility of evidence continually arise in the course of the proceedings in the reference, and call for the arbitrator's decision. In determining these, he is not at liberty to follow any arbitrary principle of his own, but is bound by the same rules of evidence as govern the superior courts (*a*).

Arbitrator bound by rules of evidence.

If, intending to decide rightly, he come to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy and propriety of allowing proof of particular facts, it is now settled law that the court will not review his decision, or set aside the award for the mistake (*b*); though in one case Lord Eldon intimated an opinion that if an arbitrator refused to hear evidence of the contents of a letter proved to be lost, that would form a good objection to an application for carrying the award into execution (*c*).

His decision not open to review.

If, however, the arbitrator refuse to hear evidence on some of the matters within scope of the reference under a mistaken impression that they are not within it, this will not be treated as a mistake of evidence, but as an omission to decide on all the matters submitted, and the award will be set aside (*d*). But when nothing but an action of debt has been referred, receiving evidence of damages for a breach of covenant, as recoverable in the action, will not avoid the award (*e*).

Refusing to hear evidence on a matter referred.

Receiving evidence of damages in debt.

If it be a doubtful point whether the matter is within the reference or not, it is better to receive the evidence, and in the award to decide the doubtful matter separately from the rest. For if there be an omission to decide it, and it ought to have been decided, the award is generally incurable; but

(*a*) Attorney-General v. Davison, 1 M'Lel & Y. 160.

(*b*) Hagger v. Baker, 14 M. & W. 9; Eastern Counties Railway Company v. Robertson, 6 M. & G. 38; Armstrong v. Marshall, 4 Dowl. 593; Perriman v. Steggall, 9 Bing. 679; Wilson v. King, 2 C. & M. 689; S. C. 2 Dowl. 638, n. a.; Campbell v. Twemlow, 1 Price, 81; Musselbrook v. Dunkin, 9 Bing. 605.

(*c*) Anderson v. Darcy, 18 Ves. 447.

(*d*) Samuel v. Cooper, 2 A. & E. 752; Brophy v. Holmes, 2 Moll. 1.

(*e*) Faviell v. East. Count. Rail. Comp. Ex. May 11, 1848. See P. 2. ch. 5, s. 8, d. 1.

if it be not within the arbitrator's power, and he has decided it, it is only an excess which, though bad in itself if clearly separable, leaves the rest of the award perfectly valid.

Receiving evidence of adultery, though not pleaded.

Where the defendant pleaded non assumpsit to an action for the board and lodging of his wife, and the arbitrator admitted evidence of the wife's adultery, and decided against the plaintiff, it was objected to the award that the arbitrator was not authorized to inquire into the fact of adultery unless it were pleaded; but the court refused to set aside the award, for assuming the objection good in law, it was only that an inadmissible witness had been called (*e*).

New evidence after accounts closed.

After an accountant employed under the arbitrators had made his report to them respecting the accounts, and it was agreed that he should close the accounts, one of the parties having found some new documents respecting the accounts which had been closed, tendered them in evidence to the arbitrators at the last meeting in the reference. The arbitrators, after looking at them to see their general nature, refused to protract the arbitration in order to sift those papers, and declining to receive them, made their award. Coleridge, J., held that this was merely a rejection of evidence by the arbitrators, and afforded no ground for impeaching the award (*f*).

Knowingly receiving inadmissible evidence.

Even when the arbitrator received the plaintiff's own books in evidence for himself, stating that he knew they were not strictly admissible on a trial at Nisi Prius, yet that he had authority to receive them, as the same strictness was not required on an arbitration, the court held this did not amount to misconduct in the arbitrator so as to authorize them to set aside the award, but treated it at the most merely as a mistake of the law of evidence (*g*).

Receiving evidence of collateral matter.

The arbitrator is authorized to inquire into matters not submitted to him, if that inquiry be necessary to enable him to decide rightly upon the questions before him, and even if he receive evidence on matters not properly affecting the

(*e*) Symes v. Goodfellow, 2 Bing. N. C. 532.

(*f*) Marsh, In re, 16 L. J., Q. B. 330.

(*g*) Hagger v. Baker, 14 M. & W. 9.

points upon which he has to decide, the objection only amounts to the reception of improper evidence, and is no such excess of authority as to induce the court to set aside the award (*h*).

Power to apply to court for directions.

Sometimes the order of reference provides "that the arbitrator shall be at liberty to apply to the court for directions on any points that may arise pending the reference as he may think necessary."

If a question arise as to the admissibility of evidence, and the arbitrator desire the direction of the court upon it, it seems to be a proper course to state the point in the shape of a certificate or case, setting out all the necessary facts for the opinion of the court. This will be considered on the argument before the court in the same manner as an objection to evidence at Nisi Prius, and the party objecting to the admission of the evidence will be entitled to begin (*i*).

Barrister arbitrating between counties and boroughs.

In the case of barristers appointed pursuant to statute to arbitrate in certain matters between counties and boroughs, the legislature has deemed it expedient to give them power, upon due requisition made, to submit a special case to the superior courts before making the award (*k*).

Party retaining power of objecting to evidence.

When a party knows the nature of the evidence to be adduced against him, and though willing that the matters in difference should be determined by arbitration, does not choose to be concluded by the arbitrator's decision on the admissibility of certain evidence, he may provide against it by introducing a clause into the submission retaining to himself the same power of objecting to the evidence as on a trial at Nisi Prius. If the arbitrator admit evidence to which the party has objected, under this provision he may move the court to set aside the award on the ground of the admission being improper (*l*).

(*h*) Eastern Counties Railway Company v. Robertson, 1 D. & L. 498; S. C. 6 M. & G. 38.

(*i*) Attorney-Gen. v. Davison, 1 M'Lel. & Y. 160.

(*k*) 7 & 8 Vict. c. 93. See Appendix of Statutes.

(*l*) Scott v. Van Sandau, 1 Q. B. 102.

PART II. CH. IV. s. 1.

Amending the record on terms.

XIII. *Duty of the arbitrator when empowered to amend.*]—A power of amending the record is often vested in the arbitrator. The following case may serve as a guide to the arbitrator as to the extent of the power, and the manner in which it should be exercised. In an action of trespass quare clausum fregit, which was referred, the arbitrator, who had all the powers of amendment which the judge of Nisi Prius would have had, directed the amendment of a plea, which alleged, that there was a public highway "*running by, and lying close to, and adjoining,*" the locus in quo, by substituting the words "running through" for the words in italics. The court held, that as it was wholly immaterial to the main question between the parties whether the road ran through or only near the close, the amendment was one the arbitrator had power to make; and that though it would perhaps have been reasonable for him to have imposed terms as to the plaintiff being at liberty to reply de novo, or as to payment of costs, if any application had been made to him for that purpose, yet that that was a matter for his discretion with which the court could not interfere (*m*).

Court no power to compel arbitrator to award.

XIV. *Power of the arbitrator to make or decline to make an award.*]—Though the arbitrator has taken on himself the burthen of the reference, and held several meetings, but not closed the case, he may decline to go on any further with the arbitration, and the courts have no jurisdiction over him to compel him to proceed (*n*).

Or to prevent arbitrator making award.

On the like principle they will in general reject any application made with a view to hinder the arbitrator making an award (*o*). Even where the defendant, an executor, was allowed to plead a plea of a judgment recovered pending the reference to the further maintenance of the action, the court took care to say that they did not at all prejudge the

(*m*) Nalder v. Batts, 1 D. & L. 700.

(*n*) Lewin v. Holbrook, 11 M. & W. 110; S. C. 2 Dowl. N. S. 991; Crawshay v. Collins, 1 Swanst. 40.

(*o*) R. v. Bardell, 5 A. & E. 619.

case, but left the effect to be attributed to such a plea entirely open for the consideration of the arbitrator (*p*.)

Proceedings in arbitration restrained by injunction.

Under very peculiar circumstances, however, the Court of Chancery will grant an injunction to restrain proceedings in an arbitration. When, in pursuance of an agreement to purchase a patent right of the defendant which contained a clause that certain differences should be referred to arbitration, the plaintiff paid the sum agreed on, and afterwards filed a bill in Chancery to recover back the purchase-money, and to compel the defendant to accept a re-assignment of the patent, on the ground of the agreement being vitiated by fraudulent conduct on the part of the defendant, the Lord Chancellor (Eldon), on motion, granted an injunction to restrain the proceedings in the reference, on the principle that the arbitration was a part execution of the agreement which was struck at by the bill (*q*).

Equity not ancillary to arbitrator.

A court of equity will not entertain a bill for a discovery in order to assist parties seeking their relief by submission to arbitration. The reason assigned by Lord Eldon is, that it is beneath the dignity of the Court of Chancery to be ancillary to the domestic forum of an arbitrator (*r*).

Arbitrator should clearly close the case.

XV. *Closing the case.*]—After having heard all the evidence which the parties chose to lay before him, and ascertained that they have no more to offer, the arbitrator, in order to prevent any misconception, should distinctly inform the parties that he considers the case closed on both sides, and that he shall proceed to make his award (*s*). Still, notwithstanding the case has been formally closed on both sides, it is perfectly competent for the arbitrator, if he shall think fit, to permit or to require the production of further evidence, either parol or documentary (*t*).

Re-opening case.

(*p*) Alder v. Park, 5 Dowl. 16.

(*q*) Mylne v. Dickinson, Coop. 195.

(*r*) Street v. Rigby, 6 Ves. 815; Wellington v. Mackintosh, 2 Atk. 569; Brown v. Brown, 1 Vern. 157, and the cases cited in the note.

(*s*) Pepper v. Gorham, 4 Moore, 148; Earle v. Stocker, 2 Vern. 251.

(*t*) Bignall v. Gale, 2 M. & G. 830.

Requiring matters in difference to be stated in writing.

If on a reference "of all matters in difference," many questions are discussed, it is a prudent course for the arbitrator, before the close of the case, to request the parties to put down in writing the matters on which they respectively require him to adjudicate. For provided he decide on the matters set out in the written statements, the award will be considered good and final, and he will not be open to the risk of having the award set aside because he has omitted to decide on some minor point which had, in fact, been raised before him, though not treated as of any real importance (*u*).

Making interlocutory award.

The arbitrator is sometimes empowered, before making his final award, to regulate by interlocutory awards the intermediate enjoyment, or to give directions respecting the intermediate management of some subject of dispute, as, for instance, the mode in which a stream of water, in which the parties claim opposing rights, is to be used pending the reference. These, from their very nature, are intended to have a temporary effect only (*x*).

The mode in which the final award is to be made is fully stated in a subsequent chapter.

Arbitrator to hear evidence on reference back.

XVI. *Duty of the arbitrator when award referred back.*] —When for a failure in the award the matters are referred back by the court to the arbitrator under a provision in the submission, his duty is to hear additional evidence on the points remitted to his consideration, and if all the matters are sent back, he must hear evidence if tendered on all, and not merely on the point in which the award is deficient.

For where an award was sent back as defective, for not determining the proper height of water in a mill-stream, and the arbitrator, thinking he had nothing to do but to look over his notes, refused to hear additional evidence which was tendered on one of the points which had been brought be-

(*u*) Angus v. Redford, 2 Dowl. N. S. 735; S. C. 11 M. & W. 69.

(*x*) Wrightson v. Bywater, 3 M. & W. 199; Manser v. Heaver, 3 B. & Ad. 295.

fore him previously, and made an award determining the height of the water, the court set the award aside on the ground of the rejection of the evidence, intimating an opinion that had the clause been to refer back "the matters referred or any of them," instead of the matters referred only, they would have raised a single point for his decision, but that as under the clause, as it was worded, all the matters referred were necessarily sent back, he was put into a position to rehear the whole matter, the parties were entitled to produce the additional evidence, and he was bound to hear them (*y*).

Party not offering evidence.

The award made on a submission which empowered the court to remit the matters referred back to the arbitrator, appearing to the attorneys of both parties to be inconsistent on its face, it was verbally agreed that the award should be considered not to have been delivered, and that the arbitrator should amend it. Subsequently to this the defendant's attorney obtained a judge's order to remit the matters referred to the consideration of the arbitrator. The latter amended his award without giving notice to either party of his intention to do so, and without hearing any fresh evidence or arguments. It was contended that the reference back by the judge's order opened the whole case again, but as the party objecting to the award had never intimated to the arbitrator his wish to offer fresh evidence, and did not even seem to have such a wish, the court held there was no ground for impeaching the award (*z*).

Award sent back for specific purpose.

When the court, being empowered so to do, remit the award for a specific purpose, as for instance, the amendment of a clerical error or technical defect in form, in regard to which the arbitrator needs no assistance from either party, he is not bound to give either party notice to attend before him on his re-considering and amending his award. Thus when it was objected to the award that the arbitrator had described one of the parties by a wrong christian name, the

(*y*) Nickalls v. Warren, 6 Q. B. 615; S. C. 9 Jur. 10. See P. 3, ch. 9, s. 8, referring the award back.

(*z*) Baker v. Hunter, 16 L. J. Ex. 203; S. C. 16 M. & W. 672.

court ordered that the award should be referred back to the arbitrator "to reconsider and amend the same if he should think fit." The court held the arbitrator justified in making the amendment without any communication with the parties. He was also held warranted in amending other errors in the award than those which formed the ground of motion. The arbitrator, by indorsement on the back of the award, certified that the award ought to be amended by substituting the right christian name for the wrong one, and that the award was to be read as if the right name had originally been inserted. He also further altered the award as to the mode of decision of a cause, and whereas previously he had decided the cause simply by directing a verdict to be entered for the defendant which he had no authority to order, he now directed the insertion of a clause stating that the defendant was not guilty of the grievances therein laid to his charge, or any or either of them, or any part thereof. A motion was again made to set aside the award on the ground that the action was improperly decided by the unauthorized direction respecting the entry of a verdict, but the court held that the objection as to the faulty mode of deciding the cause was raised too late, not being raised when the award was first objected to, and that at all events it was cured by the amendment which determined the issue, and left the direction as to the verdict simply useless (*a*).

To amend award.

When the arbitrator had omitted to decide on the issue raised on the count for an account stated, and the cause was referred back to him to set his award right, the court held the arbitrator justified in amending the error without rehearing the parties (*b*).

(*a*) Howett v. Clements, 1 C. B. 128.

(*b*) Bird v. Penrice, 6 M. & W. 754.

SECTION II.

OF THE ARBITRATOR'S DELEGATING HIS AUTHORITY.

Arbitrator may not delegate his authority.

1. *Power of the arbitrator to adopt the opinion of another.*]—By the general principle of law, one who has an authority from another to do an act for him must execute it himself, and cannot transfer it to a third person, the maxim being expressed "delegatus non potest delegare," for this being a confidence and trust reposed in the party, cannot be assigned to a stranger of whose ability and integrity he for whom the act is to be done can form no opinion (*a*). The particular authority conferred on an arbitrator forms no exception to this general rule, for it is but a naked power. He must, therefore, perform his duties in person: he may neither delegate them to another, nor elect others to act with him, unless the submission expressly authorizes such a course (*b*).

Arbitrator may adopt opinion of another.

But though an arbitrator may not delegate his authority, that is, agree beforehand to be bound by what another may decide, the cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers.

Thus, where the arbitrators had joined with the umpire in the umpirage, the court held the umpirage good as a decision of the umpire alone, and stated that he was at liberty to take what advice, or opinion, or assessors he chose (*c*).

So where it was objected to the award that the arbitrator had not exercised his own judgment respecting the valua-

(*a*) Bac. Ab. Authority, D. 41.
(*b*) Lingood v. Eade, 2 Atk. 501; West Symb, P. 2, Compromise, s. 1474.
(*c*) Soulsby v. Hodgson, 3 Bur.

tion of some timber, but had referred it to another, Lord Alvanley, M. R., said, "That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he choose to adopt it" (*d*). And on an appeal, Lord Chancellor Eldon, affirming the decree of the court below dismissing the bill to enforce the award, said, that he did not mean to determine that referring the valuation of the timber to another was a sufficient ground for refusing a specific performance (*e*).

Where two land surveyors to whom it was referred to fix the price of an estate, not being accustomed to value houses, called in two builders to value the mansion-house on the estate for them, Vice-Chancellor Leach thought there was no objection to such a course, as they had not agreed beforehand to be bound by the builders' valuation, but received their opinion merely as evidence, and giving credit to their testimony, adopted it as their own (*f*).

Power to call in a valuer.

It was laid down by Lord Lyndhurst, in a more recent case, that an arbitrator has power, without any special provision, to call in a valuer to assist him: though he seemed to think that when a special provision was made in the submission, his power in that respect ceased to be a general one arising from the necessity of the case, and was to be governed by the terms of that provision (*g*). In the same case, under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it was held by the House of Lords to be no objection to the award that they availed themselves of the assistance of such person in deciding on the partnership accounts, for that the arbitrators by adopting in terms the opinions of such person did not constitute him an umpire, but made his opinions their own, and that their award could not be impeached on that account (*h*).

(*d*) Emery v. Wase, 5 Ves. 846.
(*e*) Emery v. Wase, 8 Ves. 504, a.
(*f*) Hopcraft v. Hickman, 2 S. & S. 130.
(*g*) Anderson v. Wallace, 3 C. & F. 26.
(*h*) Anderson v. Wallace, 3 C. & F. 26.

Taking opinion on matter of fact.

II. *Duty of the arbitrator in taking an opinion as to a matter of fact.*]—An important question here arises whether, when arbitrators require the assistance of a valuer or person of skill, they are at liberty, without the knowledge of the parties, to apply privately to one on whom they can rely, and to adopt as their own and act on the opinion which he may give them as to the particular case. It is to be observed, that in *Emery* v. *Wase* (*i*), there was no irregularity in the mode of obtaining the valuer's assistance, for there were no regular proceedings, such as meetings and examination of witnesses, as in ordinary arbitrations, nor was any objection made on the ground that the arbitrator had taken the valuer's opinion respecting the timber without the knowledge of the parties. In *Hopcraft* v. *Hickman* (*k*), it appears that the agents of the parties knew of the builders being employed to value the mansion-house, and made no objection to it. And in *Anderson* v. *Wallace* (*l*), though the arbitrators conferred with a person of experience, after the case of both parties was closed and without their knowledge, they were held warranted in doing so by the express terms of the submission.

These cases, therefore, cannot be held to decide that an arbitrator is justified in privately taking advice respecting the subjects of the reference without communicating it to the parties before making his award. The contrary inference is rather to be drawn; for in *Hopcraft* v. *Hickman* (*m*), the valuer's opinion is treated as evidence, and in *Anderson* v. *Wallace* (*n*), Lord Brougham stated that the proper and more regular course, and one which a professional arbitrator would have followed, would have been to have examined as a witness the person of whose experience, pursuant to the provision of the submission, the arbitrators were empowered to avail themselves.

Arbitrator should examine adviser as witness.

Unless, therefore, a submission be so worded as expressly to permit the arbitrator to obtain the assistance of valuers

(*i*) 5 Ves. 846; 8 Ves. 504, a. See ante.
(*k*) 2 S. & S. 130.
(*l*) 3 C. & F. 26.
(*m*) 2 S. & S. 130.
(*n*) 3 C. & F. 26.

or scientific persons privately and as he may require, it seems the prudent and probably only safe course, to examine them as witnesses in the presence of the parties (*o*).

Taking opinion on point of law.

III. *Duty of the arbitrator in taking an opinion on a point of law.*]—The above remarks apply only to the opinions of persons of skill and science respecting matters of fact: but it may often happen that an arbitrator may wish to consult a legal friend or adviser in deciding a question of law,—for instance, respecting the admissibility of evidence, or the construction of a contract or other document. He cannot in this case pursue the course recommended above, to call his adviser as a witness, since evidence is not admissible on a point of law.

Arbitrator may consult counsel as to framing award.

It is said by Lord Denman, C. J., in a recent case, that it is quite a legitimate course for an arbitrator to consult a legal friend as to the mode of framing his award (*p*). Unprofessional arbitrators, it is well known, often employ an attorney to prepare it for them. The circumstance of the award being prepared even by the solicitor of the defendant in the cause referred, although indelicate, was held by Lord Eldon to be no ground for setting the award aside (*q*).

On a recent occasion, it was shown that the judges of the superior courts will sometimes take advantage privately of the assistance of an opinion given by a very eminent counsel. In giving judgment respecting the validity of a church-rate, Lord Denman, C. J., after mentioning that it had been hinted in the course of the argument that Lord Stowell, when at the bar, had given an opinion upon the point before the court, added, "We thought his opinion at the bar might throw light upon the question, and perhaps irregularly availed ourselves of this chance of instruction" (*r*).

Arbitrator taking counsel's opinion on a case.

The following cases seem to show that the propositions broadly stated in some of the cases recently cited, that an

(*o*) Dobson v. Groves, 6 Q. B. 637.

(*p*) Dobson v, Groves, 6 Q. B. 637.

(*q*) Fetherstone v. Cooper, 9 Ves. 67.

(*r*) Burder v. Veley, 12 A. & E. 233, 254.

arbitrator may take and adopt as his own the opinion of another, will authorize an arbitrator to take the advice of counsel or other professional adviser on points of law affecting not only the form but the substance of the award.

One of three arbitrators had taken the opinion of counsel on a case which he had drawn up, stating the circumstance respecting which the arbitrators differed. A motion was made in the Court of Common Pleas to set the award aside on the ground that the arbitrator had taken the opinion of counsel upon an *incorrect* statement of facts against the consent of one of the parties to the reference, and had acted on that opinion: the court said, if the facts had been so, the award would have been impeachable upon ground so clear and manifest, that it was sufficient barely to state the proposition. But as the affidavit of that arbitrator stated in answer that he had made up his own opinion on the point in dispute before he took the opinion of counsel, and that such opinion was taken for no other purpose than to guide his determination whether to accede or not to the request of a fellow-arbitrator that the facts relating to the disputed points should be set out on the award, having intended, in case such opinion differed from his own, to accede to that request, and to state the facts on the award, and that the case submitted by him to counsel contained a fair and true statement of the circumstances, the court held the objection satisfactorily removed (*t*).

Where case stated incorrectly.

In another instance, where two out of three arbitrators stated a case, and took the opinion of counsel on it, the Master of the Rolls (Sir Thomas Plumer) held that fact not to amount to any evidence of corruption or improper practice, so as to render the award void, but, on the contrary, to show a conscientious desire to adjudicate fairly, although the opinion was taken without the knowledge of the third arbitrator, and although it was alleged one important fact was erroneously stated; it appearing that there was no concealment, and that the case with the opinion was shown to

(*t*) Hare, In re, 6 Bing. N. C. 158.

the dissentient arbitrator before the award was made, that the statement alleged to be erroneous was correct according to the evidence before the arbitrators, and that the party had had ample opportunity of setting forth in evidence the true state of the facts (*u*).

Arbitrator may delegate the performance of a ministerial act.

IV. *Power of the arbitrator to delegate a ministerial act.*]—A distinction has been taken between a judicial and a ministerial act, and it seems clear that an arbitrator may delegate to another the performance of acts of a ministerial character only (*x*). It is not always easy to ascertain what acts are included under the head of ministerial acts. The measurement of the number of acres in a field or the surface of a lake has been so considered (*y*). Probably the functions of an accountant who is employed merely to make up the accounts of a firm would be held to be ministerial only (*z*).

SECTION III.

OF THE DUTY OF JOINT ARBITRATORS.

Joint arbitrators not agents of respective parties.

I. *Disadvantages of reference to several arbitrators.*]—It is a common practice for the submission to provide that the plaintiff and defendant shall each appoint an arbitrator. The arbitrators so selected are not to consider themselves the agents or advocates of the party who appoints them. When once nominated, they are to perform the duty of deciding impartially between the parties, and they will be

(*u*) Goodman v. Sayers, 2 J. & W. 249.

(*x*) Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 437.

(*y*) Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457.

(*z*) Harvey v. Shelton, 7 Beav. 455. See post.

looked upon as acting corruptly if they act as agents or take instructions from either side (*a*).

Two arbitrators appointing a third.

In order to ensure a decision in case of difference of opinion, the submission frequently goes on to prescribe that the two arbitrators shall name a third, and that an award made by any two, if they cannot all agree, shall be sufficient. But it is in general much better to refer the matters to a single arbitrator at once, for notwithstanding the objectionable nature of such a course, the arbitrators named by the parties often seem to think that they are to represent their respective nominors, and act rather as advocates than judges, while the third arbitrator frequently supposes that he is an umpire, and that his active interference is not to commence until the others have differed finally. On one occasion, where the course of conduct of the three was such as has been adverted to, Coleridge, J., strongly condemned references of this sort, saying that in his opinion they were "senseless and mischievous, founded on a totally wrong principle, expensive in their operations, and constantly ending in failure and disappointment (*b*).

Submission ambiguous.

Sometimes the framing of the submission is so ambiguous, that it is difficult for the court to decide on the respective duties of each arbitrator. Thus, where a cause was referred to two arbitrators and such third person as they should nominate as their umpire, and the parties agreed to perform the award to be made by the two and their umpire, the court refused to enforce by attachment performance of an award made by the two arbitrators alone, considering it a doubtful point whether the award was not intended to be the joint act of the three (*c*).

The above remarks, and the rules contained in the following divisions of this section for the guidance of joint arbitrators, show clearly the additional liability to failure, when several arbitrators are appointed instead of one only.

(*a*) Fetherstone v. Cooper, 9 Ves. 67; Watson v. Duke of Northumberland, 11 Ves. 153; Calcraft v. Roebuck, 1 Ves. Jr. 226; Maule v. Maule, 4 Dow. 363.

(*b*) Templeman & Reed, In re, 9 Dowl. 962; Marsh, In re, 16 L. J., Q. B. 330.

(*c*) Heatherington v. Robinson, 7 Dowl. 192.

II. *Duty of all the arbitrators to act.*]—On a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office as if he were sole arbitrator; for as the office is joint, if one refuse or omit to act the others can make no valid award (*d*). For though in cases of persons appointed to fulfil public duties the decision of a majority is generally sufficient, the cases are numerous to show that the law puts a different construction on authorities of a private nature like that of arbitrators, and generally requires that all who are entrusted with such powers must concur in order to their valid execution (*e*).

Each arbitrator must act.

Waiving objection to not acting.

But if two arbitrators are to appoint a third to act with them, and they mistakenly appoint a person as umpire, and the two alone hold the reference and make the award, a party who has attended the meetings without objecting to the case being heard by the two only, cannot afterwards impeach the award as invalid for want of the concurrence of a third arbitrator (*f*).

Arbitrators may not delegate to each other.

The arbitrators may not delegate their authority even to each other. Two merchants, arbitrators, may not delegate to the third arbitrator, though he be a barrister, the decision of a point of law arising out of the case. Where the rest of the award had been determined on, but a point of law had been left to the barrister to decide, and he made and executed his award alone, according to the previous arrangement, and the result of his decision on the question of law, and the award was afterwards executed by another of the arbitrators, (an award made by two only being good,) the court set it aside on the ground that there was no principle of law authorizing the two merchants to delegate their power of judging, and that it was impossible to say, but that

(*d*) Little v. Newton, 2 M. & G. 351; Stalworth v. Inns, 2 D. & L. 428. See P. 2, ch. 3, s. 3, d. 7, as to effect of refusal to act as a revocation.

(*e*) Grindley v. Barker, 1 B. & P. 229; Vin. Ab. Authority, B.; R. v. Whitaker, 9 B. & C. 648; Crawshay v. Collins, 3 Swanst. 90.

(*f*) Marsh. In Re, 16 L. J., Q. B. 330.

if the barrister had expressed his opinion on the point of law to the others before the award was made, some arguments might not have been raised by them, which would have produced a different result from that at which the barrister arrived alone (*g*).

But may adopt opinion of each other.

But if each of the arbitrators exercise his own independent judgment on the matters referred, it is no objection to the award that on discussion one gives way to the other, for where two differ in opinion, one or both must give way, otherwise they never can agree (*h*).

All the arbitrators must act together.

As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision (*i*).

Separate examination of witness irregular.

So necessary is it that the arbitrators should act jointly, that where referees in the case of a joint arbitration agreed to carry on their inquiries apart, and to examine the witnesses separately, and if they concurred in the result to decide accordingly, it was laid down by the court that such a course of proceeding would not be sanctioned in any instance, but that an award made on facts so ascertained would be set aside as procured by "undue means," since such a mode of examination was a departure, not merely from established courses of procedure, but from natural justice (*k*).

Arbitrators should execute award all together.

If two arbitrators meet and agree on the terms of an award, though they afterwards, when it is drawn up, fix their respective signatures to it at different times and different places, the Court of Common Pleas seem inclined to doubt whether they would hold an award void for the objection that the execution ought to have been by both to-

(*g*) Little v. Newton, 9 Dowl. 437.

(*h*) Eardley v. Steer, 4 Dowl. 423.

(*i*) Plews v. Middleton, 6 Q. B. 845; Little v. Newton, 9 Dowl. 437; S. C. 2 M. & G. 351; Stalworth v. Inns, 2 D. & L. 428.

(*k*) Plews v. Middleton, 6 Q. B. 845.

gether (*l*). But in a late case the Court of Exchequer were strongly of opinion that the award should have been reduced into writing by the common consent of the arbitrators, and jointly executed by them; on the principle that the law required every judicial act done by several should be completed in the presence of each other, and that in the case of arbitrators it was possible that at the last moment one might change his opinion. The court added a hope, that having had this intimation from the court, arbitrators would in future take care that the execution of the award should be joint (*m*).

Appointment of umpire condition precedent.

It is often made a condition precedent that before the two arbitrators proceed with the reference they shall appoint an umpire. When such is the case the proceedings may be invalid unless the umpire is so appointed.

Under the Lands, Railways, and Companies Clauses Act.

In references under "The Lands Clauses Consolidation Act, 1845," "The Railways Clauses Consolidation Act, 1845," and "The Companies Clauses Consolidation Act, 1845," the appointment of an umpire must be made before entering upon the matters referred. In treating of the appointment of an umpire this point is more fully examined (*n*).

Two choosing third to act with them.

II. *Duty of the arbitrators when award by less than all valid.*]—If two arbitrators only are appointed by the submission, and they are to choose a third to act with them, and an award made by any two is to be valid, they must choose their colleague before they take any step in the reference in order that the parties may have the benefit of the judgment of all three on the whole of the matters.

Enlarging time before appointing third arbitrator.

Thus, if the award is to be made on, or before a certain day, or such other day as the said arbitrators, or any two of them, shall appoint, it is necessary for the two to ap-

(*l*) Little v. Newton, 9 Dowl. 437.

(*m*) Stalworth v. Inns, 2 D. & L. 428; S. C. 9 Jur. 285.

(*n*) See P. 2, ch. 4, s. 4, d. 2, p. 214.

point a third before they make any enlargement of the time, or the enlargement will be void (*o*).

Two may act if third refuse.

Under such a submission it will be sufficient for any two of them to act jointly, though the third from obstinacy or the desire of a party, or business, or any other cause, absent himself from the meetings, provided he have full notice and opportunity of being present at them if he please, and be not kept away by any practice of the other arbitrators or of the parties (*p*). When there is no positive refusal to act, two cannot make a good award without first taking the opinion of the third. If after discussion he refuse to concur with them in the award, they may then execute it, and it will be binding (*q*). But in order to justify such a course the following cases show that there should first be a full discussion and a final refusal to agree.

Consulting third arbitrator where no refusal.

A proposed award was shown at a meeting of the three arbitrators to which one of them objected, and he, after a discussion, declared that if the other two would not alter their view they must make the award by themselves, and he would not join in it. Had the two, on this state of the facts, made their award, the court intimated an opinion that it would have been valid. But the arbitrators not treating this refusal as final, got into further communications, for afterwards a draft different from that of the proposed award was sent by the other two by mistake to the arbitrator, who disagreed, and he returned it to them with comments and objections. The two subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator. The court set aside the award on the ground that the two, after receiving the objections, were bound to take them into consideration, and consult with the other arbitrator upon them, and at least to hear

(*o*) Reade v. Dutton, 2 M. & W. 69; Hughes v. Garnett, cited 2 M. & W. 69.

(*p*) Goodman v. Sayers, 2 J. & W. 249; Dalling v. Matchett, Willes, 215; S. C. Barnes, 57; Morphett, In re, 2 D. & L. 967.

(*q*) White v. Sharp, 12 M. & W. 712; Sallows v. Girling, Cro. Jac. 277; Berry v. Perry, 3 Bulst. 62; Thomas v. Harrop, 1 S. & S. 524.

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what he had to say in support of them before they finally determined (*r*).

So when the two originally named arbitrators having differed about some items, agreed each to furnish the third with a written statement of what he thought the award should be, and another award was made by the third and the one whose views he adopted without any further meeting of all three, the court set the award aside because the three never consulted together upon it; adding, that it by no means followed from the difference of the original arbitrators that the reasonings and arguments of the third might not have produced unanimity, and that the one whose views were rejected was entitled to the opportunity of discussing the award with the other two, though had a meeting been arranged and he refused to attend, this refusal would have justified the two who agreed in treating the difference as final, and in making their award (*s*).

Lands Clauses Act, death, &c., of one of two arbitrators.

When the parties have each appointed an arbitrator on a reference respecting the compensation to be paid for lands taken under a special Act of Parliament for the purposes of a public undertaking sanctioned by the Act, "The Lands Clauses Consolidation Act, 1845," enacts, in section 26, that "If before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing, some other person to act in his place, and if for the space of seven days after notice in writing, from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid." Section 30 provides, that "If where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the

(*r*) Pering v. Keymer, In re, 3 A. & E. 245.

(*s*) Templeman & Reed, In re, 9 Dowl. 962.

other arbitrator may proceed ex parte, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

Railways Clauses Act.

Clauses almost verbatim with the above are to be found in sections 127, 131 of "The Railways Clauses Consolidation Act, 1845 (*t*).

Companies Clauses Act.

In "The Companies Clauses Consolidation Act, 1845," s. 129, a similar enactment occurs. The clause is as follows: "If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable, or refuse, or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint, in writing, some other person to act in his place, and if for the space of seven days after notice in writing, from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid."

What a refusal of the arbitrator to act.

Two arbitrators appointed under "The Lands Clauses Consolidation Act," held a meeting in the reference, at the close of which meeting it was agreed that they should proceed next day with the case. Early the following morning, before the time for the meeting, one of the arbitrators wrote to the solicitor of the railway company who had appointed him, stating that he could not attend on account of important business; he also expressed his desire that the meeting should go on without him, and that he should be furnished with notes of the evidence taken. He did not attend, and the meeting was held without him. Vice-Chancellor Knight Bruce held that this was not such a refusal to act as to justify the other arbitrator in proceeding alone (*u*).

(*t*) 8 & 9 Vict. c. 20. See Appendix of Statutes.

(*u*) Hawley v. North Staffordshire Railway Comp., V. C. K. Bruce, Feb. 18, 1848. See P. 2, ch. 4, s. 4, d. 5, for the case fully.

SECTION IV.

OF THE UMPIRE.

PART II. CH. IV. S. 4.

Office of umpire.

I. *By whom an umpire is to be appointed.*]—Where two arbitrators are appointed, the submission often provides that in case of their not agreeing in an award, the matters shall be decided by a third person, who is styled an umpire (*a*).

Appointed by submission or arbitrators.

The umpire is sometimes named in the submission; but more generally the submission merely provides that he shall be appointed by the arbitrators (*b*).

Arbitrators, no implied power to appoint.

Though they cannot agree, the arbitrators have no power to appoint an umpire, unless authorized to do so by the submission. If the submission be to the award of A. and B., and D. being umpire, the words shall receive a liberal construction, and be held, according to the common construction of the word umpire, to mean that D. is to decide as umpire in case A. and B. cannot agree in their award as arbitrators (*c*).

Appointment to decide between arbitrators bad.

It is improper for the arbitrators, under the ordinary provision empowering them to appoint an umpire, to appoint a person to be an umpire between *themselves*, instead of between the *parties*, for the meaning of the provision in the submission is, that the arbitrators should make an award on all the matters in difference, and if they cannot agree on all, that the umpire should decide on all (*d*).

Appointment of umpire under the Lands Clauses Consolidation Act.

On a reference under "The Lands Clauses Consolidation Act, 1845" (*e*), it is provided by s. 27, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred

(*a*) Com. Dig. Arb. F.; Rolle Ab. Arb. P. 7, 8.

(*b*) Anon. Jenk. 3d. cent. case 61, p. 129.

(*c*) Com. Dig. Ab. Arb. F.; Rolle Ab. Arb. P. 4.

(*d*) Tollit v. Saunders, 9 Price, 612.

(*e*) 8 & 9 Vic. c. 18. See Appendix of Statutes.

to them, nominate and appoint by writing under their hands an umpire, to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act; and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final." The 28th section enacts that "if in either of the cases aforesaid the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final."

Under the Railways Clauses Consolidation Act.

"The Railways Clauses Consolidation Act, 1845" (*f*), contains like provisions. S. 128 of that act is verbatim the same as s. 27, above given; and s. 129 of that Act is word for word the same as s. 28 of the above Act, except that the words between "Board of Trade," and "shall on the application," are omitted.

Under the Companies Clauses Consolidation Act.

Very similar enactments are found in "The Companies Clauses Consolidation Act, 1845" (*g*) for that Act enacts in s. 130, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith, after such death, refusal, or neglect, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final."

(*f*) 8 & 9 Vic. c. 20. See Appendix of Statutes.

(*g*) 8 & 9 Vic. c. 16. See Appendix of Statutes.

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In section 131, it is provided that "if in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to the arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ, shall be final."

Commissioners of Railways substituted for Board of Trade.

It may be proper to notice in this place, that by the recent statute, the 9 & 10 Vict. c. 105, s. 2, all the powers of the Board of Trade, with respect to railways, or intended railways, have been transferred to the Commissioners of Railways appointed under that Act.

Appointment of umpire on differences between the Post Office and Railway Companies.

Under the Act to provide for the conveyance of the mails by railways (*h*), the arbitrators chosen to settle the differences between the Post Master General and a railway company, respecting the amount to be paid to the company for such conveyance, are by s. 16 directed to appoint an umpire previous to their entering upon the inquiry; and by s. 18, "if such umpire shall refuse, or neglect to proceed and make his award for the space of twenty-eight days after the matter shall have been referred to him, then a new umpire shall be appointed by the two first-named arbitrators, who shall in like manner proceed and make his award within twenty-eight days, or in default be superseded, and so toties quoties."

Appointment to be made at time prescribed.

II. *When the arbitrators should appoint the umpire.*]—Sometimes, in order to insure the appointment of an umpire before the arbitrators' minds are embarrassed with the matters in difference, the appointment is made a condition precedent to the proceeding at all in the reference; when such is the case, the arbitrators should make the appointment before they take any other step, or the whole proceedings may be

(*h*) 1 & 2 Vic. c. 98. See Appendix of Statutes.

invalid (*i*). Merely enlarging the time before appointing the umpire is not an entering on the consideration of the matters in difference, so as to render the appointment a nullity (*k*).

When arbitrators to appoint, no time prescribed.

When the submission makes no special provision respecting the time when the arbitrators are to appoint the umpire, and a day is given to the umpire subsequent to that limited for the arbitrators making their award, they may appoint an umpire at any time before the time for making the umpirage has expired, for the power of appointing an umpire is quite collateral to that of making an award, and survives when the latter power is extinct (*l*).

If the submission run that in case the arbitrators should disagree in their opinion, it shall be competent for them to appoint an umpire, they may appoint one in the first instance, and need not wait until they have investigated the matters, and found that they cannot agree (*m*). This too seems the better course to pursue, for the arbitrators are more likely to agree on an umpire before they have disagreed about the subject referred to them (*n*). In an old case, Holt, C. J., held that the arbitrators had no power to choose an umpire before the time allowed for the award had expired (*o*). This view was also adopted by Mansfield, C. J. (*p*): but that decision of Holt's, C. J., seems contrary to another decision of his (*q*), and has been often overruled, and cannot now be considered as law (*r*).

(*i*) Hick, In re, 8 Taunt. 694; Bright v. Durnell, 4 Dowl. 756.

(*k*) Cudliff, v. Walters, 2 Moo. & Rob. 232.

(*l*) Harding v. Watts, 15 East, 556; Barnard v. King, cited 2 Keb. 15; S. C. Rolle Ab. Arb. P. 6; Watson v. Clement, Rolle, Ab. Arb. P. 5; Burdett v. Harris, 3 Keb. 387; Adams v. Adams, 2 Mod. 169; Anon. Freem. 378.

(*m*) Bates v. Cooke, 9 B. & C 407.

(*n*) Harding v. Watts, 15 East, 556.

(*o*) Reynolds v. Gray, 1 Salk. 70.

(*p*) Beck v. Sargent, 4 Taunt. 232.

(*q*) Mitchell v. Harris, 12 Mod. 512; S. C. Salk. 71.

(*r*) Roe d. Wood v. Doe, 2 T. R. 644; Harding v. Watts, 15 East, 556; Doyley v. Pitslow, E. T. 28, G. II., cited 15 East, 557, n. (d.); R. v. Outram, T. T. 29, G. III., cited 15 East, 557, n. (d.); Cowel v. Waller, 2 Barnard, 154; Elliott v. Cheval, 1 Lutw. 541; Jennings v. Vandeputt, Cro. Car. 263; Coppin v. Hurnard, 2 Saund. 133, *a* note.

PART II. CH. IV. S. 4.

Appointment of umpire under various statutes.

It will be seen by reference to the preceding division of this section that "The Lands Clauses Consolidation Act," "The Railways Clauses Consolidation Act," and "The Companies Clauses Consolidation Act," and the Act to provide for the conveyance of the Mails by Railway, all contemplate, in the first instance, that the arbitrators are to appoint an umpire before entering into a consideration of the matters referred to them (*s*).

Within what limit under "The Lands Clauses Consolidation Act."

A recent decision in the Queen's Bench respecting the validity of an umpirage under "The Lands Clauses Consolidation Act," throws considerable light upon the question as to when the umpire must be appointed.

The facts, as stated in the judgment, were as follow:—A railway company who required certain lands for the purposes of their Act, appointed an arbitrator to assess the compensation to be paid the landowner on the 23rd of March, 1847, and the claimant his on the 6th of April. These arbitrators did not appoint an umpire, or enter on the matters referred, and both parties, before the 29th of April, joined in applying to the Board of Trade to appoint an umpire. On the 29th of April, the claimant objected to the appointment of an umpire not a barrister. The company afterwards made a request to the arbitrators, and after seven days another application to the Board of Trade (*t*), who, on the 17th of May, appointed a surveyor to be the umpire. He made the declaration before a justice required by the statute on the 27th of May, and his award on the 26th of July.

Upon these facts it was objected, that the appointment of the umpire was too late, on the ground that by "The Lands Clauses Consolidation Act," it ought to have been made within twenty-one days after the appointment of the arbitrators, and that their appointment being complete on the 6th of April, more than twenty-one days had elapsed between that day and the 17th of May, the date of the umpire's appointment.

(*s*) See p. 214. See Skerratt v. North Staffordshire Railway Company, 17 L. J. Ch. 161; S. C. 12 Jur. 46; 2 Phill. 475.

(*t*) In reality the appointment was by the Commissioners of Railways.

The court, however, held the appointment to be good, and made the following observations respecting the effect of the statute in this particular:—

"It appears to us that the powers given for arbitration continue for three months after the arbitrators are appointed, and are determined then only by section 23 enacting that the question shall be settled by a jury, if, when the matters shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made:—that the 31st section, providing that the umpire shall determine where neither of the arbitrators refuses or neglects to act, and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire; but not to render void the submission to arbitration and the other powers incidental thereto, such as the appointment of an umpire.

"The statute contemplates three cases, where a single arbitrator is to award; and in each of those cases he has three months for the purpose; viz. where a single arbitrator is originally appointed under section 25; or a vacancy is left unsupplied under section 26; or one of the two refuses or neglects to act under section 30. It is to be observed an umpire connot be brought into action in either of these cases. Then section 31 provides for two arbitrators acting and failing to award. If they so fail for twenty-one days, and do not extend their time, the power to award is taken from them, and vested in such umpire as is duly appointed under the other provisions of the statute which are not affected by this section.

"The incapacity to make an award has no effect upon the power given to the arbitrator under section 27, and to the Board of Trade on their default under section 28, to appoint a new umpire in case of the death or failure of the first; and we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire. If the construction contended for

by the claimant be correct, it might happen that at the end of twenty-one days the power to award might cease, and the power to resort to a jury still be suspended for the residue of three months, which would be a delay without purpose. On these grounds we have come to the conclusion that the appointment of the umpire was valid" (*t*).

Appointment of umpire must be by choice, not chance.

III. *How the arbitrators are to choose an umpire.*]— The acknowledged general rule as to the mode of appointing the umpire is, that the appointment must be the act of the will and concurring judgment of both the arbitrators; it must not be dependent on chance, but must be a matter of choice, unless the parties consent to or acquiesce in some other mode of appointment (*u*).

It was always held, that if the two arbitrators tossed up which should nominate the umpire to the exclusion of the other, an appointment so made was bad (*x*); but previous to the laying down of the general rule just stated some doubt had been raised (*y*) by a decision of Lord Ellenborough's whether the appointment of an umpire by lot was invalid, when each arbitrator had previously proposed a person for the office, and no objection was made to him by the other arbitrator, that learned judge having decided, that under such circumstances there could be no objection to their determining by lot their selection of one out of the two fit persons(*z*). This decision of Lord Ellenborough's was pressed upon the court in *Cassell, In re* (*a*), but after consideration they came to the conclusion that it was better to avoid nice distinctions, and laid down the above rule, which has since been followed by the courts in all subsequent cases (*b*).

(*t*) Bradshaw v. East and West India Docks and Birmingham Junction Railway Comp., Q. B., June 2, 1848.

(*u*) Cassell, In re, 9 B. & C. 624.

(*x*) Harris v. Mitchell, 2 Vern. 485; Hewitt v. Penny, Sayer, 99.

(*y*) Young v. Miller, 3 B. & C. 407; Wells v. Cooke, 2 B. & A. 218.

(*z*) Neale v. Ledger, 16 East, 51.

(*a*) 9 B. & C. 624.

(*b*) Ford v. Jones, 3 B. & Ad. 248; Greenwood and Titterington, In re, 9 A. & E. 699; Hodson v. Drewry, 7 Dowl. 569.

In a recent case, two arbitrators tossed up for the choice of an umpire: the one who won the toss named a person for umpire, but on the other arbitrator objecting, afterwards abandoned his choice, and proposed to toss up again for the choice of another. The latter arbitrator, however, did not consent to this, but insisted that it was his turn to name an umpire, and he then chose a person who afterwards acted as umpire, the former arbitrator making no objection. The court held, that though the appointment of the first umpire would have been bad as an appointment by lot had it been persisted in, the second appointment was good, being one of choice, not chance, and was not vitiated because one arbitrator devolved on the other the entire discretion as to the selection (*c*).

Consent of parties renders valid appointment by lot.

After the rule laid down in *Cassel, In re* (*d*), there was, at one time, some inclination shown by the courts to hold that even the assent of the parties could not render valid an appointment by lot, on the ground that it was better to abide by a simple rule than to permit an inquiry on affidavit into the doubtful question of whether the parties assented (*e*). Yet it is now beyond dispute that the courts have adopted the exception as well as the rule laid down by Lord Tenterden in *Cassell, In re* (*f*), and the appointment by lot of an umpire, will be sustained, if the parties either previously or subsequently give a clear assent to such a mode of election (*g*). That assent, however, to be binding, must be given with a full knowledge of all the circumstances (*h*). If the arbitrators merely inform the parties that they have mutually chosen A. B. to be umpire, and the parties approve of the appointment, not knowing the umpire has been selected by lot, the umpire obtains no binding authority by such assent (*i*). Even if the attorney of the party know that the

Assent must be given with full knowledge.

(*c*) Vinnikum and Morgan, In re, 5 Jur. 72.
(*d*) 9 B. & C. 624.
(*e*) Ford v. Jones, 3 B. & Ad. 248; Hodson v. Drewry, 7 Dowl. 569.
(*f*) 9 B. & C. 624.
(*g*) Hodson v. Drewry, 7 Dowl. 569; Tunno & Bird, In re, 5 B. & Ad. 488; James v. Attwood, 7 Scott, 841.
(*h*) Wells v. Cooke, 2 B. & A. 218.
(*i*) Greenwood & Titterington, In re, 9 A. & E. 699.

selection has been made by tossing up, and assent to it, assuming that the attorney has power to bind his client, the award will not bind him, if the important circumstance be not disclosed of the arbitrator who lost the toss having previously personally objected to the umpire, when originally proposed by the other arbitrator (*k*).

The clerks to the attornies cannot assent.

The clerks to the attornies have no authority to bind the parties, by assenting to the selection of an umpire by lot, nor will his authority be ratified if in ignorance of the mode of election the parties attend before him (*l*).

Appointing fresh umpire if first refuse.

Though it was doubted in some old cases (*m*), there does not now seem to be much question that on the refusal of the umpire first named to act, the having once executed their power by appointing an umpire, does not prevent the arbitrators from appointing another. For though when the arbitrators have once executed their authority by appointment of an umpire, they cannot revoke it and execute it again; this seems to apply only to the case of an effectual appointment, and there is no effectual appointment, unless it is accepted by the person named as umpire (*n*). If they make the appointment in terms conditional on acceptance, it is clear their power to make a second appointment remains in case of a refusal by the party first selected (*o*).

When there is an effectual appointment of an umpire, it cannot be affected by the disapproval of the parties (*p*).

No special form of appointment.

If the submission provide no special form of appointment of the umpire, a parol appointment is sufficient (*q*). Sometimes the submission requires it to be in writing, sometimes that it be under the hand and seal of the arbitrators, or that it be indorsed on the submission. Whatever the direction is, the arbitrator should follow it closely. The appointment

(*k*) Jamieson & Binns, In re, 4 A. & E. 945.

(*l*) Hodson v. Drewry, 7 Dowl. 569.

(*m*) Reynolds v. Gray, 1 Salk. 70; S. C. 1 Ld. Raym. 222, 12 Mod. 120.

(*n*) Oliver v. Collins, 11 East, 367; Trippet v. Eyre, 3 Lev. 263; S. C. 1 Show. 76, 2 Vent. 113; Com. Dig. Ab. Arb. F.

(*o*) Reynolds v. Gray, 1 Salk. 70; S. C. 1 Ld. Ray. 222.

(*p*) Oliver v. Collins, 11 East, 367.

(*q*) Oliver v. Collins, 11 East, 367.

requires no stamp, unless it be under seal, and delivered as a deed (*r*).

Appointment in writing, Lands, &c. Clauses Act.

The appointment of an umpire by the arbitrators under the Lands Clauses Consolidation Act, the Railways Clauses Consolidation Act, and the Companies Clauses Consolidation Act, must, we have seen, be in writing under their hands (*s*).

Commencement of authority, no time limited.

IV. *Commencement and duration of the umpire's authority.*]—Where no time is limited for the making of the award, the umpire's authority can commence from no other period than the disagreement of the arbitrators (*t*).

When time limited for award.

If there be a time limited for the award, his authority commences absolutely from that limit, even though the arbitrators have never met to agree or disagree on the subject, for the not making an award shows they have not agreed (*u*).

Commencing subject to defeasance.

When the umpire has a period allowed him for making his umpirage later than the time given to the arbitrators, his authority may commence before the expiration of the time limited to the arbitrators, subject, however, to defeazance. For if the arbitrators disagree, and refuse to make an award, the umpire may proceed at once with the reference, and need not wait until the time allotted to the arbitrators has expired, and his decision will be binding, even if made before the time for the award has elapsed. It will however become a nullity in case the arbitrators afterwards resume their authority, agree, and make an award within the time allotted them (*x*).

Submission naming umpire giving same limit for arbitrators and umpire.

If the *submission name the umpire* as well as the arbitrators, and appoint the *same day* as the limit for both the

(*r*) Routledge v. Thornton, 4 Taunt. 703; Dod v. Herbert, Styles, 459.

(*s*) See ante, division one of this section.

(*t*) Com. Dig. Arb. F.

(*u*) Lumley v. Hutton, Rolle, Ab. Arb. P. 1.

(*x*) Smailes v. Wright, 3 M. & S. 559; Sprigens v. Nash, 5 M. & S. 193; Dare v. Chase, 2 Show. 164; Cowel v. Waller 2 Barnard, 154.

award and umpirage, some of the older cases seem to show that the appointment of the umpire is absolutely void, and that he cannot make any umpirage even if the arbitrators make none. Other cases seem to qualify this opinion, by holding the umpirage might be good when the arbitrators had disagreed, and declared they would not intermeddle any more, or where one of the arbitrators had died, and so rendered it impossible for them to agree in an award (*y*).

The courts, in the first class of cases, seem to have apprehended a difficulty in allowing the umpire to have in any case a concurrent jurisdiction with the arbitrators, on the ground of the confusion that would be created if there were two awards (*z*), and therefore held the appointment of the umpire void when the same day was limited for the award and umpirage. That difficulty will be removed, however, if the courts, as they probably would, should hold in cases where only one day is limited, as they hold in cases where the umpire has a further day, that the umpirage made after disagreement of the arbitrators shall stand good, unless the arbitrators subsequently agree in making an award within the time, in which case their decision is that which is to conclude the parties.

When arbitrators to choose umpire, and same limit for arbitrators and umpire.

When there is only *one limit*, and *the arbitrators are to choose the umpire* if they cannot agree, it is held in many old cases that by choosing an umpire they renounce their power and cannot again resume it, so that if after the appointment of the umpire they agree and make an award, that award is null, and will not invalidate the umpirage previously made (*a*).

We have already seen that where a further day is given to the umpire, the arbitrators do not renounce their authority by appointing an umpire, but are recommended to

(*y*) Coppin v. Hurnard, 2 Saund. 129, and see notes to same; S. C. 1 Lev. 285; Raym. Rep. 187; Mitchel v. Harris, 1 Salk. 71; Anon. 2 Vern. 100; Barber v. Giles, Rolle, Ab. Arb. P. 2; Barnard v. King, Vin. Ab. Arb. P. 6.

(*z*) Smailes v. Wright, 3 M. & S. 559; See last note.

(*a*) Twisleton v. Travers, 2 Keb. 15; S. C. 1 Lev. 174; Dunavan v. Mascall, 1 Lev. 302; Fyall v. Varier, Rolle Ab. Arb. P. 3; Danes v. Monsay, Vin. Ab. P. 18, p. 97.

select one in the first instance; it is probable, therefore, that the same uniform principle would now be extended to cases where one day only is limited for both the award and umpirage, and that the umpire's decision would be held good, and subject to becoming nugatory in case the arbitrators after his appointment made an award within the limited time (*b*).

What a disagreement of the arbitrators.

When the umpire's power is to commence on the disagreement of the arbitrators, to justify the umpire in interfering, there must be such a difference between the arbitrators as renders their agreement in an award hopeless (*c*). Whether there has been such an essential difference, is a question of fact, to be decided sometimes by a jury, sometimes by the court, according to the nature of the proceedings.

The word "disagreement," however, must in general be construed to mean non-agreement (*d*). Where the arbitrators intimate to the umpire that there is no probability of their making any award (*e*), or where one of them, after some meetings, declines to proceed further in the case, or where one of the arbitrators insists on further evidence being produced which the other refuses to allow (*f*), these states of things may amount to such a disagreement, or non-agreement, as to call the umpire's powers into exercise, and where no time has been limited, finally to determine the arbitrators' authority (*g*). And for this effect it is not necessary that the arbitrators should have heard the whole of the evidence, and then differ. If a sufficient disagreement take place while the evidence is only part heard, the umpire's authority will commence (*h*).

The circumstance of no award having been made by the arbitrator, and of the award having in fact been made by

(*b*) See Coppin v. Hurnard, 2 Saund. 133, b. note.

(*c*) Cudliff v. Walters, 2 Moo. & Rob. 232.

(*d*) Doddington v. Bailward, 7 Dowl. 640; Middleton v. Chambers, Vin. Ab. Arb. P. 17.

(*e*) Doddington v. Bailward, 7 Dowl. 640.

(*f*) Cudliff v. Walters, 2 Moo. & Rob. 232.

(*g*) Tunno v. Bird, In re, 5 B. & Ad. 488.

(*h*) Tunno v. Bird, In re, 5 B. & Ad. 488.

the umpire, will, it seems probable, in the absence of anything to show that the arbitrators are still considering the case, be taken by the court as primâ facie information that the arbitrators did not agree (*i*).

Umpire empowered to enlarge time before disagreement.

The umpire's authority may for some purposes commence before any disagreement of the arbitrators. Where the submission gives both the arbitrator and the umpire power of enlarging the time, and the arbitrators enlarge their time beyond the original limit fixed for the umpire making his umpirage, the umpire may, within his original period, enlarge his time further, although there has been no disagreement between the arbitrators before he makes his enlargement; and it seems necessary that he should take this step, in order to preserve his authority alive (*k*).

Umpire no authority when arbitrators award on part.

If the arbitrators within the time make an award respecting part of the matters submitted to them, the umpire cannot, unless specially authorised, decide on the rest, because he is in general only empowered to act in case the arbitrators make no award at all before a certain day, and then he is to decide on all the matters (*l*).

Duration of umpire's authority.

As the arbitrators must make their award within the time limited to them, so, when the submission fixes a limit, the umpire must make his umpirage within the time limited to him (*m*).

Duration under the Lands Clauses Consolidation Act.

In the case of references under the provisions of "The Lands Clauses Consolidation Act, 1845" (*n*), the enactments respecting the commencement and duration of the umpire's authority are the following.

Section 23 provides, "if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of

(*i*) Doddington v. Bailward, 7 Dowl. 640; Com. Dig. Arb. F.

(*k*) Doddington v. Bailward, 7 Dowl. 640.

(*l*) Rolle. Ab. Arb. P. 7, 8; Year Book, 39 H. VI. 11.

(*m*) Trew v. Burton, 1 C & M. 533; Salkeld v. Slater, In re, 12 A. E. 767.

(*n*) 8 & 9 Vict. c. 18.

such compensation shall be settled by the verdict of a jury as hereinafter provided."

Section 27 enacts, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands, an umpire, to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or of the special Act," &c.

And section 31 directs, that "if where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid."

Commencement of the umpire's authority under the Act.

It is plain, from these sections, that if the arbitrators do not enlarge the time, or enlarge it to a period less than three months from the date of the appointment of the last of the two arbitrators, the authority of the umpire will commence, in the first case after the expiration of twenty-one days from the date of such appointment, and in the second case from the expiration of the enlarged period.

Whether umpire may proceed at once if arbitrators differ.

Whether the words in section 27, that the arbitrators are to appoint an umpire to decide on any such matters "on which they shall differ," &c., would authorize the umpire in proceeding at once with the case, supposing a final difference and disagreement took place between the arbitrators within the twenty-one days, or within such enlarged period, or whether the apparent effect of these words is controlled by the terms of section 31, has not yet received a judicial interpretation.

There seems to be nothing in the language of section 31 which would prevent the court from deciding that in case of an absolute disagreement at any time between the arbitra-

tors, the umpire might, if called upon, proceed to hear the case and make his award immediately, although the period allowed to the arbitrators had not expired, and that his award should be valid, unless the arbitrators within their allotted period should afterwards agree and make an award.

The advantage of such a construction of the statute would be, that it would be in accordance with the rule laid down for umpires in other cases, as has been shown in the pages immediately preceding. It might also, in many cases, prevent a delay of several months in obtaining a settlement of the question in dispute. The chance of the arbitrators agreeing in an award, after having once absolutely differed, and after the umpire had been called in, is practically very remote.

From what date the three months for the umpire to be computed.

There is a difficulty also respecting the duration of the umpire's authority under this Act. By section 23 the arbitrators or the umpire are to make the award within three months. But from what date that period of three months is to be computed when the umpire is called upon to act, whether from the date of the appointment of the first of the two arbitrators, or of the last of the two arbitrators, or from the appointment of the umpire himself, or from the time that the arbitrators' power expires; has been open to much difference of opinion.

Whether from appointment of umpire.

In a case in the Bail Court, Patteson, J., set an award under this Act aside, on the ground that being made more than three months after the appointment of the umpire, it was made too late (*n*).

Later cases, however, put a different construction on the Act.

Whether from appointment of arbitrators.

A railway company, who required certain lands under the Act, appointed their arbitrator on the 23rd of February, 1847, and the landowner his on the 9th of March. The two arbitrators appointed an umpire on the 29th of March. No award was made by the arbitrators, nor did they enlarge the time. The umpire made his award on the 28th of June.

(*n*) Ward v. North of England Railway Comp., M. T. 1847.

Wigram, V. C., set aside the award, on motion, among other reasons, on the ground that it was made too late, not having been made within three months after the appointment of the last arbitrator.

To be computed from duty devolving on umpire.

But on appeal against this decision, Lord Cottenham, C., adverting to the fact that the statute intended the umpire to have the opportunity of making an award, and that if the arbitrators exhausted all the period, the umpire would have no time left in which to perform his duty, if he were bound to award within the original three months, reversed the judgment; holding the proper construction of the statute to be, that the umpire had three months to himself in which to make his award, to be computed (when there was no enlargement of time by the arbitrators) from the expiration of the twenty-one days after the appointment of the second arbitrator, and when there was an enlargement, from the end of such enlarged time; provided, that as the arbitrators had no authority to enlarge to any time later than three months after the appointment of the second arbitrator, the umpire's authority would at the latest commence from the end of such first three months, and continue then for three months longer (*o*).

In a very recent instance, on a motion in the Queen's Bench to set aside an award of an umpire under the statute, one of the grounds of objection being, that the award was made too late, there being more than three months between the appointment of the arbitrators and his award; the court overruled the objection, saying, "We find it decided ex parte *Skerratt* v. *The North Staffordshire Railway Company* (*p*), that the three months for the umpire commence from the duty devolving upon him. In this decision we fully concur. And as this award of the umpire was made within three months from the duty devolving upon him, and

(*o*) Skerratt v. North Staffordshire Railway Company, 17 L. J., Ch. 161; S. C. 12 Jur. 46; 2 Phill. 475.

(*p*) 2 Phill. 475; S. C. 17 L. J., Ch. 161; 12 Jur. 46.

indeed within three months from his appointment, it is not too late (*q*).

Limit of umpire's time on references between the Post-Office and Railway Companies.

Under the statute which provides for determining by arbitration disputes between the Postmaster-General and Railway Companies respecting the carriage of the mails, each successive umpire has twenty-eight days from the time the matter shall be referred to him, allowed for making his award (*r*).

Umpire same powers and duties as arbitrators.

v. *Power and duty of the umpire.*]—The umpire, when called upon to act, is in general invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the same duties. He must pursue the same regular course with respect to the conduct of the case, as if he were commencing a new case as arbitrator. He must examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission or a clear agreement between the parties permitting such a course (*s*).

Must re-hear case.

Requiring umpire to hear evidence.

Even where there was some evidence of an original consent by a party that the umpire should make his award on the arbitrator's notes without re-hearing the witnesses, but his attorney, who conducted the case for him, afterwards demanded that the umpire should receive oral testimony, and the latter refused to receive any vivâ evidence unless it were new evidence, or on a new matter, the court set the award

(*q*) Bradshaw v. East and West India Docks and Birmingham Junction Railway Comp., June 2, 1848. See the facts of the case stated in d. 2 of this section, p. 218.

(*r*) 1 & 2 Vict. c. 98, ss. 16, 18. See Appendix of Statutes.

(*s*) Salkeld v. Slater, 12 A. & E. 767; Jenkins, In re, 1 Dowl. N. S. 276; Waltonshaw v. Marshall, 1 H. & W. 209; Matson v. Trower, Ry. & M. 17.

aside (*t*). It is true, the objection to his proceeding without re-hearing the witnesses may be waived by the conduct of the parties, but the waiver must be clearly made out, or the award will be set aside (*u*).

Waiving objection to not rehearing case.

Where a party knew that the case had gone before the umpire, and that he had been furnished by the arbitrators with the notes of the evidence and a statement of the claims of the parties, and that the umpire had already said that if he required further information he would call a meeting, the court refused to set aside the award of the umpire on the objection that it was made without hearing evidence, because under the circumstances it was the duty of the party, if he had thought it necessary, to have called on the umpire to hear evidence, and then his declining might have been a ground of objection. But that as the party had not done so, but had taken the chance of the award, he could not afterwards come to the court to impeach the award on this ground (*x*).

Party not requiring umpire to hear evidence.

A railway company requiring some lands for the purposes of the railway, and disputes having arisen respecting the amount of compensation, a reference was had to arbitration under the provisions of "The Lands Clauses Consolidation Act, 1845" (*y*). The landowner appointed his arbitrator, and the company theirs; and the two arbitrators appointed an umpire, and enlarged the time for making their award till the 19th of November. On the 4th of November a meeting was held before the two arbitrators and the umpire together, (it having been agreed to by the parties that the umpire should be present to hear the evidence,) and it was intended to proceed with the case on the next day. Early on that day, the 5th of November, the company's arbitrator wrote to the company's solicitor, stating that he was unable to attend on account of some business. The solicitor, therefore, attended before the other arbitrator and the um-

Umpire under "The Lands Clauses Consolidation Act."

(*t*) Salkeld & Slater, In re, 12 A. & E. 767.

(*u*) Salkeld & Slater, In re, 12 A. & E. 767; Jenkins, In re, 1 Dowl. N. S. 276.

(*x*) Tunno & Bird, In re, 5 B. & Ad. 488; Hall v. Lawrence, 4 T. R. 589.

(*y*) 8 & 9 Vict. c. 18. See Appendix of Statutes.

pire, and protested against the reference going on in the absence of the company's arbitrator, and then withdrew from the meeting. Notwithstanding this protest, after the company's solicitor was gone a witness was examined on the part of the landowner before the single arbitrator and umpire. No further meeting was ever held, and nothing was ever after done in the case by the company's arbitrator. On the 11th of November the solicitor of the company wrote to the arbitrators and umpire, protesting against their making any award. No award was made by the arbitrators. After the 19th of November, when the enlarged time had expired, the landowner's solicitor called on the umpire to make an award: in compliance with which request, the umpire, on the 29th of November, made his umpirage without hearing any evidence, or holding any meeting, or giving notice to the company or their solicitor of his intention to make an award, or offering them any opportunity of producing evidence. A motion on the part of the company was made in the following term to set aside the award on the ground of the irregularity of the proceedings. The company's solicitor swore that he had had evidence to produce on the part of the company. V. Ch. Knight Bruce set the award aside, holding that the umpire had acted improperly in deciding the case without either hearing the case de novo, or at least taking it up from the meeting of the 4th of November, and giving the company an opportunity of producing their evidence. He held, also, that the absence of the company's arbitrator on the 5th of November for the reasons he assigned was not a refusal to act within the meaning of s. 30 of the statute so as to justify the other arbitrator in proceeding ex parte. He added, however, that if the non-attendance of the company's arbitrator had been procured by the fraud or collusion of the company, the latter would, in his opinion, have been bound by the proceedings at a meeting held before the other arbitrator just as much as if both arbitrators had been present (*z*). On appeal to the Lord Chancellor this decision was confirmed.

(*z*) Hawley v. North Staffordshire Railway Company, reported in 12 Jur. 389.

Though the arbitrators agree on some matters, and the case is referred to the umpire because they disagree on others, the umpire must not confine his award to the latter, but must award equally on all as if the arbitrators had disagreed on all. His judgment is in no way fettered by theirs (*a*).

Umpire must award on all matters.

An award in which the umpire and arbitrators join, and in which the arbitrators decide some points, but reciting that they cannot agree on another point, refer that to the umpire who decides it, is bad (*b*). But if, after their authority has expired, the arbitrators join with the umpire in making the umpirage, the decision will be held valid as that of the umpire alone; for it is no more than if mere strangers join in the umpirage, and that cannot vitiate it (*c*).

Joint award by arbitrators and umpire.

(*a*) Roll. Ab. Arb. P. 7; Wicks v. Cox, 11 Jur. 542.

(*b*) Tollit v. Saunders, 9 Price, 612.

(*c*) Beck v. Sargent, 4 Taunt. 232; Soulsby v. Hodgson, 3 Burr. 1474; Anon. 1 Bulst. 184.

CHAPTER V.

THE DUTY OF THE ARBITRATOR IN FORMING HIS AWARD.

Scope and contents of the fifth chapter.

IT having been attempted in the preceding chapters of this part to set forth at large the qualifications of the arbitrator, the various powers with which he is invested to facilitate his investigation into the matters before him, and the course which he ought to take in conducting the inquiry from its commencement to its close, the natural division of the subject brings us now to a consideration of that which is the ultimate object of every reference, the award, or instrument embodying the decision of the arbitrator on the matters submitted.

This chapter, therefore, treats generally of the award, and of those broad principles of decision, in accordance with which the arbitrator should both frame his judgment in his own mind, and express it in language to the parties.

The first section is confined to the formal requisites of the award, showing the mode in which it is to be made, published, and delivered; and the second contains general observations about the form of the award, and how it should be drawn up.

But the five next sections, each announce a principle, disobedience to which will either wholly or partially invalidate the award.

The first of these, section three, announces, that the award must be one entire instrument.

Section four proclaims the leading principle of all, into which, indeed, many of the others may be resolved, that the award must be final, that is, a complete adjudication on every matter intended by the parties to be determined; its various divisions illustrate the effect of leaving a matter undecided, and of the presumption of the courts in favour of the validity of the award, and disclose the consequences of an imperfect decision, or of a reservation of a point for future judgment.

Section five declares the next most comprehensive principle, namely, that the award must be certain.

Section six shows that the award must be mutual; and section seven, that it must direct only what is possible, and that its provisions must be consistent with each other.

The eighth section examines into the effect of a mistake on the part of the arbitrator on the validity of the award, whether that mistake proceed from an erroneous judgment on a point of fact, or arise merely from accident, and whether it be apparent on the face of the award or not. It investigates, also, how far the extrinsic statements of the arbitrator respecting the grounds of his award will be received to impeach it when apparently valid, and points out the course to be pursued by him when he is empowered to raise a point of law on the face of his award for the opinion of the court.

The ninth section makes manifest that notwithstanding there may have been some violation of the principles above enumerated, some adjudication on matters not before the arbitrator, or some directions which it exceeded the arbitrator's power to impose, the whole award will not be rendered null, if that portion which is open to objection can properly be separated from the rest.

The concluding or tenth section treats of awards under "The Lands Clauses Consolidation Act."

SECTION I.

OF THE FORMAL REQUISITES OF THE AWARD.

PART II. CH. V. s. 1.

I. *Making the award.*]—In making his award, the arbitrator must follow the directions of the submission in point of form; for whenever a special authority is created those who give it have a right to annex to it their own terms, with which he on whom it is conferred must comply; therefore when the submission provides that the award be in writing under the hand of the arbitrator, the award to be valid must be under the arbitrator's hand as well as in writing (*a*); where it is to be in writing, under the hand and seal of the arbitrator, an award in writing only is insufficient (*b*). An award in writing, and under seal, was in an old case held invalid, when the submission required that it should be indented, as well as in writing and sealed (*c*); but the objection that the award was not indented has on a later occasion been scouted by the court (*d*).

The award must follow the submission.

If the submission be silent as to form, the arbitrator is at liberty to make his award with such formalities as he pleases.

Parol award valid.

Unless prescribed by the submission, the award need not necessarily be in writing, for a verbal award is perfectly valid (*e*). Even where the submission required the award to be made and ready to be delivered by a certain day, a parol award was held good, for a parol award is capable of oral delivery (*f*).

(*a*) Everard v. Paterson, 6 Taunt. 625.

(*b*) Henderson v. Williamson, 1 Strange, 116; Thaire v. Thaire, Palm. 109, 112; S. C. 2 Rol. Rep. 243.

(*c*) Hinton v. Cray, 3 Keb. 512.

(*d*) Gatliffe v. Dunn, Barnes, 55.

(*e*) Hanson v. Liversedge, Carth. 156; S. C. 2 Vent. 242; Rawling v. Wood, Barnes, 54.

(*f*) Oates v. Bromil, 1 Salk. 75; S. C. 6 Mod. 160; Cocks v. Macclesfield, Dyer, 218, b.; Blundell v. Brettargh, 17 Ves. 232, 240.

But unless there be some specified reason to the contrary, it is advisable for the arbitrator always to make his award in writing, for a parol award is open to many serious objections, among the most obvious of which are, that it depends on the accuracy of man's memory, that it is doubtful whether the courts would enforce it by attachment, and that it would probably, in many cases, be ineffectual where it concerned interests in land.

But objectionable.

In general, but subject of course to the particular provisions of the submission, the arbitrator makes his award in writing, and signs his name at the foot. It is customary to have an attesting witness who may prove the execution.

Signing award.

We have already seen that where there are several arbitrators all should execute at the same time and in presence of each other (*g*).

Joint execution by all.

In practice, it is usual for the arbitrator to make his award on paper stamped with a proper award stamp. This he delivers to the successful party. For the unsuccessful party he has a copy made on unstamped paper which he does not sign or execute as an award unless requested so to do.

Practice, how award made.

By the provisions of "The Lands Clauses Consolidation Act, 1845" (*h*), and "The Railways Clauses Consolidation Act, 1845" (*i*), the declaration made and subscribed by the arbitrator, before entering on the reference, is to be annexed to the award when made. The penalty of omitting to answer the declaration is not stated. The 37th section of the former Act, and the 137th section of the latter Act, enact, that "no award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter in form."

Lands, &c., Clauses Acts.

Declaration of arbitrator annexed to award.

Award not void for want of form.

II. *Publishing the award.*]—The submission generally provides that the arbitrator shall make and publish his award

Publishing award.

(*g*) Little v. Newton, 9 Dowl. 437; Stalworth v. Inns, 2 D. & L. 428. See ante, P. 2, ch. 4. s. 3, p. 209. Duty of Joint Arbitrators.

(*h*) 8 & 9 Vict. c. 18, s. 33. See Appendix of Statutes.

(*i*) 8 & 9 Vict. c. 20, s. 134. See Appendix of Statutes.

PART II. CH. V. S. 1.

in writing, ready to be delivered to the parties at their request on or before a certain day. Hence, beside making, the arbitrator must publish his award.

Award published when executed.

So far as the validity of the award is affected, it will in general be considered as "published" as soon as the arbitrator has done some act whereby he becomes functus officio, and has declared his final mind, and can no longer change it,—that is, as soon as he has made a complete award (*k*).

When the award was executed by the arbitrator in the presence of witnesses who attested it, and to whom it was read over at the time, and the plaintiff died on the following morning, but before he had notice that the award was ready, the court held that it was made and published in the lifetime of the plaintiff, and could not be set aside as published after his death; though two hours after the plaintiff's death the plaintiff's attorney received a note from the arbitrator, stating he was about to declare his award, and desiring him to attend at his office the same evening (*l*).

If there be several arbitrators, it will not, it seems, be published until it is signed by the requisite number of arbitrators (*m*).

Publishing to the parties.

Where the submission provided that the award should be made and published "utrique partium," by a certain day, (the parties being the plaintiff on one side and several defendants on the other,) though the award was made and published to the plaintiff and one of the defendants, it was held that the plaintiff could not recover on the award as he had not published it to all of the defendants (*n*).

It may be important to mention, that so far as regards the rule which regulates the time for an application to set aside an award, the publication, from which the time begins to run, is not in any case the publishing of the award itself, but the

(*k*) Henfree v. Bromley, 6 East, 309; Macarthur v. Campbell, 5 B. & Ad. 518.

(*l*) Brooke v. Mitchell, 6 M. & W. 473.

(*m*) Little v. Newton, 2 M. & G. 351.

(*n*) Hungate v. Mease, Cro. Eliz. 885; S. C. 5 Rep. 103; F. Moore, 642.

publication of it to the parties (*o*). Therefore, as soon as the arbitrator has executed the award, he should give notice of it to the parties that it is made and ready to be delivered.

Award ready to be delivered.

III. *Delivering the award.*]—The award is usually to be ready to be delivered by a certain day. When it is made it is ready to be delivered, and the court will so intend it, especially where it is to be ready to be delivered on request (*p*). It need not be actually delivered by the appointed day in order to its validity, if it be ready to be delivered by that day (*q*). A refusal by the arbitrators to deliver an award to the defendant who made his request for it on the last day limited, on the ground that it had not been stamped, has been held a good defence to an action on the bond for non performance of the award, as it showed the award was not ready to be delivered within the appointed time (*r*).

When delivery necessary.

If the submission, instead of providing that the award be ready to be delivered, directs that it be delivered to the parties by a certain day, in order to be valid, the award must be actually delivered by the day. When the submission enjoined a delivery to either of the parties, it has been held that the delivery must be made to both (*s*). But when there are two parties on each side, and the award is to be made and given up to the said parties, or to one of them, it has been held sufficient to deliver it to any one of either party (*t*).

Arbitrator delivering award on payment of fees.

In general, however, the arbitrator's duty is only to have the award ready for delivery to the parties, on their request,

(*o*) Macarthur v. Campbell, 5 B. & Ad. 518; Brook v. Mitchell, 6 M. & W. 473; Moore v. Darley, 1 C. B. 445.

(*p*) Veale v. Warner, 1 Saund. 327, b. notes; Garret v. Weeden, 1 Lev. 133; Bradsey v. Clyston, Cro. Car. 541; Marks v. Marriot, 1 Ld. Raym. 114; Joyce v. Haines, Hard. 399; Freeman v. Bernard, 1 Ld. Raym. 247; Robison v. Calwood, 6 Mod. 82; Anon. 2 Ld. Raym. 989.

(*q*) Brown v. Vawser, 4 East, 584.

(*r*) Wilson v. Wilson, 1 Saund. 327, c. n. (*m*).

(*s*) Parker v. Parker, Cro. Eliz. 448; Block v. Palgrave, Cro. Eliz. 797.

(*t*) Cocks v. Macclesfield, Dyer. 218, b.

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before the period of his authority has expired; the delivery itself may take place at any time.

Either party, as soon after the publication as he pleases, may obtain it from the arbitrator on payment of his charges. But until they are paid, it is usual, in order to insure their discharge without any trouble, for the arbitrator to keep the award in his own hands. This course has been recommended by the court, even when the party who takes up the award is not to be ultimately liable to pay them (*u*). If the unsuccessful party be the one who comes to take up the award, in practice the unstamped and unsigned copy is commonly all that is given him, while the award itself is kept for the party in whose favor the arbitrator has decided.

Award under the Lands Clauses Act.

In cases of references under "The Lands Clauses Consolidation Act, 1845" (*x*), it is provided by section 35, that "the arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the same award, and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose."

Stamp on award.

IV. *Stamping the award.*]—By the present Stamp Act, 55 G. III. c. 184, a duty is imposed on all awards in writing (*y*).

Exceptions, masters and workmen.

Exceptions, however, have been made by statute in favor of awards in certain cases. Thus awards made under the

(*u*) Hicks v. Richardson, 1 B. & P. 93.

(*x*) 8 & 9 Vic. c. 18. See Appendix of Statutes.

(*y*) 55 G. III. c. 184, Schedule. Part 1, Title Award. Award in England, and award or decreet arbitral, in Scotland, 1*l.* 15*s.* And where the same, together with any schedule, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*

acts for settling by arbitration disputes between Masters and Workmen (*z*), and concerning Savings' Banks (*a*), and in certain cases concerning Friendly Societies (*b*), are exempted from stamp duty. Possibly the 6 G. IV. c. 16, s. 98, which exempts from stamp duty all "instruments and writings whatsoever relating solely to the estate or effects of any Bankrupt or Bankrupts, or any part thereof," would be held to exempt from duty awards made on references by assignees of a bankrupt. We have previously seen that Parke, B., has ruled at Nisi Prius that submissions by assignees respecting claims of the bankrupt for work and labour are freed from duty (*c*).

Savings Banks, Friendly Societies.

Bankrupts' estates.

In general, however informal the decision may be, if it be an award in fact, the statute applies. Thus, where a bond had been given conditioned for A. M.'s due discharge of the duties of clerk, to be ascertained by the inspection of A. M.'s accounts by J. S., and the amount so ascertained to be liquidated damages, J. S. being looked upon as an arbitrator, a paper, in which J. S. had ascertained the amount of the deficiency in A. M.'s accounts, was held by Parke, B., to be an award, and to require stamping as such (*d*). So also a partnership account, ascertaining how much each partner had received and disbursed, dividing the profits among them according to their respective interests, and directing those who have money to pay to the partnership to hand it over to those who have money to receive, though not purporting to be an award on the face of it, is an award, and requires a stamp as such, if the party who makes out the account be empowered to act as an arbitrator, but is not an award if he merely make it out for the information of the parties, and have no power to bind them (*e*).

Informal award.

Though the several parties to the submission have separate

One stamp, several parties.

(*z*) 5 G. IV. c. 96, s. 32. See Appendix of Statutes.

(*a*) 9 G. IV. c. 92, s. 45; 7 & 8 Vic. c. 83, s. 14. See Appendix of Statutes.

(*b*) 9 & 10 Vic. c. 27, s. 15. See Appendix of Statutes.

(*c*) See Wright v. Webb, cited P. 1, ch. 3, s. 7, d. 2, p. 91.

(*d*) Jebb v. M'Kiernan, Moo. & M. 340.

(*e*) Carr v. Smith, 5 Q. B. 128; Goodyear v. Simpson, 15 M. & W. 16.

rights and liabilities, the award will need only a single stamp, if they have a sufficient community of interest in the subject matter referred, as, for instance, when the several underwriters on a policy of insurance agree to refer the demand of the assured on that policy (*f*).

Inclosure award not require ad valorem stamp.

Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments, their award, awarding lands given in exchange partly for other lands, and partlyfor money, was held sufficiently stamped with the ordinary stamp, and not to require an ad valorem stamp on the money consideration, although it operated as a conveyance of the lands (*g*).

Award under seal no deed.

It was decided under a previous statute, imposing only a 10*s*. stamp on awards, that an award in writing, and under seal, was no deed or specialty, and therefore need not have a deed stamp, unless it were delivered as a deed, but if it were delivered only as an award, an award stamp was sufficient (*h*). The distinction now is immaterial for that purpose, as the like duties are imposed on an award as on a deed, by the 55 G. III. c. 184.

Appraisement no award.

In order to necessitate an award stamp, the document must strictly be an award. Hence, where on an agreement between an incoming and outgoing tenant, the valuation of some goods on a farm and of the repairs was to be determined by certain referees, an appraisement stamp on the written valuation was held sufficient under the 46 G. III. c. 43, and an award stamp unnecessary, the valuation not being looked upon as an award, although in some respects it had the same effect; as, in the opinion of the court, the parties in appointing persons to settle the account, had no contemplation of submitting any differences to the award of arbitrators (*i*).

(*f*) Goodson v. Forbes, 6 Taunt. 171; S. C. 1 Marsh. 525; See also Allen v. Morrison, 8 B. & C. 565.

(*g*) Doe d. Ld. Suffield v. Preston, 7, B. & C. 392.

(*h*) Brown v, Vawser, 4 East, 584; Blundell v. Brettargh, 17 Ves. 232; Dod v. Herbert, Sty. 459; Perry v. Nicholson, 1 Bur. 278; Hodsden v. Harridge, 2 Saund. 64, l.

(*i*) Leeds v. Burrows, 12 East, 1; Perkins v. Potts, 2 Chitt. 399.

Parke, B., is in one case reported to have said, that an award stamp is only to be imposed on those instruments which on their face purport to be awards. This proposition, according to other decided cases, does not seem maintainable so broadly as it is stated. In the case referred to, the learned judge held admissible in evidence, though unstamped, a written verdict of a miner's jury, who were to determine whether the defendant was possessed of a certain shaft of a mine, the defendant having agreed to be bound by their determination, and the plaintiff having also assented to the arrangement (*k*). The document, though in the nature of an award, and strong evidence against the defendant, was not considered as an award in fact, or conclusive in evidence as an award would have been, and the jury were looked upon rather as accredited agents than arbitrators. They do not appear to have had any *animus arbitrandi*, though the parties had agreed to be bound by their opinion. In order to the validity of a decision as an award, there must, it is apprehended, be, besides the submission of the parties, an intention in the person who decides it to decide as arbitrator. The correctness of this view the court seemed inclined to sanction, though there was no positive decision, on an occasion when it was questioned whether an opinion of counsel subjoined to a case, containing a recital of an agreement to be bound by the counsel's opinion, which opinion commenced "upon the facts above stated, I am of opinion," was an award, and required a stamp. It was also discussed, but not decided, whether the case was "a matter annexed" to the award within the meaning of the Stamp Act, the words of which were to be reckoned in calculating the amount of stamp duty (*l*).

Instrument not purporting to be award.

Animus arbitrandi.

Opinion of counsel.

Matter annexed.

An award, if not properly stamped at first, may be so stamped at any time on paying the penalty, and it cannot be set aside on the ground that the stamp is improper, when

Award may be stamped at any time.

(*k*) Sybray v. White, 1 M. & W. 435.

(*l*) Boyd v. Emmerson, 2 A. & E. 184; Sybray v. White, 1 M. & W. 435.

PART II. CH. V. S. 2.

no step has been taken to enforce it (*m*). Where an objection to the stamp was not alleged as a ground for obtaining a rule to show cause to set aside an award, the court would not suffer it to be relied on afterwards when cause was shown (*n*). But when it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the court to object to the absence of a stamp on the award, and on that account to refuse to draw up the rule (*o*).

Master objecting to want of stamp.

No stamp on a certificate.

If an arbitrator have to certify for whom and for what amount a verdict is to be entered in the cause referred, the certificate does not require a stamp. This course of directing an arbitrator to certify, instead of to make an award, is often adopted for the very purpose of saving the expense of the stamp and award (*p*).

SECTION II.

OF THE FORM OF THE AWARD.

Any words expressing a decision an award.

With regard to the substance of the award, any form of words that amounts to a decision of the questions referred, will be good as an award. No technical expressions are necessary (*a*). But as awards often bind valuable rights for all time, it is incumbent on the arbitrator to be very precise and clear in his adjudication (*b*).

On a dispute respecting the amount of dilapidations, the

(*m*) Preston v. Eastwood, 7 T. R. 95.

(*n*) Liddell v. Johnstone, 2 Tidd. Pr. 874, 7th Ed.; 844. 9th Ed.

(*o*) Hill v. Slocombe, 9 Dowl. 339.

(*p*) Salter v. Yeates, 5 Dowl. 291.

(*a*) Eardley v. Steer, 4 Dowl. 423.

(*b*) Stonehewer v. Farrar, 9 Jur. 203.

report of an umpire in these words, "I have surveyed and estimated the several works necessary to be done in repairing the dilapidations to a house, and find the same amount to £55. 5s.," was held a conclusive award, binding on the parties (c). So the words, "I am of opinion that A. is entitled to claim of B. £134 for non-performance of his contract," was held a sufficient award (d). Where parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, his opinion being positive and decisive was considered a binding award, notwithstanding it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted (e).

But where the arbitrator wrote a letter to A. and B., the parties, in which he said, "To meet the circumstances of the case in a liberal manner, I propose that B. should pay A. £10," this was not considered an award, because it did not express a decision that A. was *entitled* to the £10, but only recommended that that sum should be given him (f).

No recitals necessary in award.

It is not necessary to the validity of the award that there should be any introductory recitals. The award will be good, although the arbitrator neglect to set out his authority, either by reciting the submission, or in any other manner; or if he omit to recite the fact of the time having been enlarged, even when the award appears to have been made beyond the time originally limited for making it (g). Failing to recite that he had taken a view of the premises in dispute was considered unimportant, although the taking a view was enjoined before proceeding in the reference (h).

But though such recitals are not essential, it is advisable that they should be made, in order in many cases to explain

(c) Whitehead v. Tattersall, 1 A. & E. 491.

(d) Matson v. Trower, Ry. & Moo. 17.

(e) Price v. Hollis, 1 M. & S. 105.

(f) Lock v. Vulliamy, 2 N. & M. 336; S. C. 5 B. & Ad. 600.

(g) Baker v. Hunter, 16 L. J. Ex. 203; S. C. 16 M. & W. 672; George v. Lousley, 8 East, 12.

(h) Spence v. Eastern Counties Railway Company, 7 Dowl. 697.

PART II. CH. V. S. 2.

the award, and that they who peruse it may see on the face of the instrument that the arbitrator had authority to award as he has done, and that he has fully performed his duty.

What recitals advisable.

In general an arbitrator recites verbatim so much of the order of reference, or other submission, as contains his authority to make the award, and specifies the subject-matter on which the award is made. Any provisions of the submission which are necessary to warrant particular directions, as, for instance, respecting costs, or saying what should be done, ought to be set forth. But those clauses which confer on him powers which he does not exercise, or those which more especially affect the parties, it is not recommended that he should specify (*i*).

Recital specifying matters in difference.

As questions difficult of proof may sometimes arise long after the award has been made, whether certain matters were matters in difference at the time of the submission, it has been recommended as a convenient course that the award on a submission of all matters in difference should, in the recital, specify the subjects in difference, and in the disposing part refer to them, because in an action subsequently brought on any of the matters referred, the award would then give a complete and indisputable defence (*k*).

Nor would this course leave the award open to any cavil for having omitted to specify some little matter, which, though in difference was of no real importance, if the arbitrator has followed the course previously advised, of requesting the parties respectively to furnish him with a written statement of the matters on which they require his decision (*l*).

False recital not give authority.

An arbitrator cannot by a false recital give himself an authority beyond the submission. Thus a recital that the arbitrator has power to determine what should be done by the parties, will not cure an excess of authority in awarding

(*i*) King v. Bowen, 1 Dowl. N. S. Bowen, 1 Dowl. N. S. 21.

(*k*) Brown v. Croydon Canal Cy. In re, 9 A. & E. 522; King v.

(*l*) See ante, Angus v. Redford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735.

something to be done, when it appears that he has in fact no such authority (*m*).

False recital not vitiate award.

As a false recital cannot bind the parties beyond the submission, neither will it invalidate the award (*n*). An award by an umpire is not vitiated by a mistake in the recital of the award, in the christian name of one of the original arbitrators who had appointed the umpire (*o*), or by a statement that the umpire was appointed by the parties, when he was in fact chosen by the arbitrators (*p*), or where the award purports to be made by three, and is executed only by two (*q*), or by a misrecital respecting the date of the submission (*r*), or the extent of the subject-matter (*s*), or where the arbitrators having appointed an umpire, who was to decide in case they should disagree, recited that they had "considered the decision of the umpire," and there had in fact been no disagreement, and consequently no consultation of the umpire (*t*).

In one instance of a reference by a judge's order, where the award misrecited the submission as a reference by order of Nisi Prius, the Court of Common Pleas used the expression that the award was a "nullity." It was not, however, necessary to determine the validity of the award to dispose of the motion, and it may be gathered from the reports that they only meant to say they would not enforce it by attachment, for in one report they are said to add, that the plaintiff, if he thought fit, had his remedy by action (*u*). This case, as Parke, B., recently remarked, was decided "rather

(*m*) Price v. Popkin, 10 A. & E. 139.

(*n*) Watkins v. Philpotts, M'Lel & Y. 393; Baker v. Hunter, 16 M. & W. 672.

(*o*) Trew v. Burton, 1 C. & M. 533.

(*p*) Adams v. Adams, 2 Mod. 169; S. C. Vin. Ab. Arb. (N. 2) 3.

(*q*) White v. Sharp, 12 M. & W. 712; S. C. 1 D. & L. 1030, overruling Thomas v. Harrop, 1 S & S. 524.

(*r*) Dole v. Dawson, 2 Keb. 878; S. C. Vent. 184; Ingram v. Webb, 1 Rolle. Rep. 362.

(*s*) Paull v. Paull, 2 C. & M. 235; S. C. 2 Dowl. 340; Kynaston v. Jones, Styles 97; S. C. Vin. Ab. Arb. (N. 2) 2; S. C. Al. 85.

(*t*) Harlow v. Read, 3 D. & L. 203.

(*u*) Christie v. Hamlet, 2 M. & P. 316; S. C. 5 Bing. 195.

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rapidly." It is no authority against the previous propositions (*x*).

Certificate instead of award.

Instead of making a formal award, the arbitrator, on a reference at Nisi Prius, is often directed or empowered to express his decision in a certificate addressed to the officer of the court. The expense of the award stamp is thereby saved (*y*).

(*x*) Baker v. Hunter, 16 L. J., Ex. 203; S. C. 16 M. & W. 672.

(*y*) Salter v. Yeates, 5 Dowl. 291.

SECTION III.

THE AWARD MUST BE ENTIRE.

Award not to be made in parts.

Unless specially authorized by the submission, an arbitrator is not permitted to make his award by parcels. An award must be one entire and complete instrument in itself; therefore, if it be made part one day and part at another, though each and every part be made within the time limited for the award, it will be void (*a*).

Consulting as to parts good.

If there be several arbitrators, they may indeed assemble and consult, and form their final determination on specific matters at several days, but their award, which expresses their final determination on all the matters together, must be one and entire (*b*).

Thus, where by an order of reference a cause and all matters in difference between A. & B. were referred, and by a subsequent order made after the first reference had commenced, it was directed that C. should be made a party thereto, as if he had been an original party, and that a cause between A. & C., and all matters in difference between A. B. & C., each and every of them jointly and severally should be referred to the same arbitrator, and the arbitrator made two awards, in one of which he awarded that A. was indebted to B. without mentioning C.; in the other, that A. was indebted to C. without mentioning B.; it was held both awards were bad, and that the arbitrator had not properly performed his duty, as there was no one award determining all the matters in difference between all the parties (*c*).

When arbitrator empowered to make several awards.

It is, however, perfectly legal, and sometimes very advisable, for the parties to give the arbitrator power to make

(*a*) Com. Dig. Arb. E. 16; Rolle, Ab. Arb. H. 1, 2, p. 250.
(*b*) Com. Dig. Arb. E. 16; Rolle, Ab. Arb. H. 3, p. 250.
(*c*) Winter v. Munton, 2 Moore, 723.

several awards, if he shall think fit. When so empowered, he may include the several matters referred to him distributively in separate awards, which may be final and binding from the time of their several executions (*d*).

SECTION IV.

THE AWARD MUST BE FINAL.

Award must be final.

1. *Effect of clause, Ita quod fiat de præmissis.*]—The arbitrator must be careful to see that his award is a final decision on all the matters requiring his determination.

Ita quod.

The submission, after referring the matters to the arbitrator; usually contains a condition, "so that the award be made of and concerning the premises." The old Latin expression containing the like condition ran thus, "Ita quod fiat de præmissis."

Old rule when no ita quod, award in part good.

The old rule, both in equity and law, was, that unless the submission were expressly made conditional with an ita quod fiat de præmissis, an award respecting one matter submitted was good, provided it was not necessary to make the award just that the other matters should have been decided also; but that where there was such a condition, all matters brought before the arbitrator must have been determined, or the award would have been void (*a*). A determination of all matters was held imposed where the submission ran, "so as

(*d*) Dowse v. Cox, 3 Bing. 20; Wrightson v. Bywater, 3 M. & W. 199.

(*a*) Wrightson v. Bywater, 3 M. & W. 199; Dowse v. Coxe, 3 Bing. 20; Ormelade v. Coke, Cro. Jac. 354; Hide v. Cooth, 2 Vern. 109; Baspole's Case, 8 Rep. 97, b; Payne v. Cook, cited in Simmonds v. Swaine, 1 Taunt. 548; Rolle, Ab. Arb. L.; Simmonds v. Swaine, 1 Taunt. 548; Bean v. Newbury, 1 Lev. 139; Randall v. Randall, 7 East, 81.

the said award," or "so as the same award," be made within the time, even though it did not say, "of and concerning the premises" (*b*).

Modern rule, whether parties intend a decision of all.

In more modern instances, it is said an express condition is not required; but the question in all cases to be decided is, whether the terms of the submission show that the parties mean every point in dispute to be decided by the arbitrator (*c*). The courts, relaxing their ancient rigour, will now put on the submission a reasonable construction according to its plain meaning, and as it is not ordinarily the intent of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest, it follows that the arbitrator is generally bound to make a final decision upon all the matters referred to him, in order that his award as to any should be effectual (*d*).

Arbitrator empowered to make several awards.

In ascertaining, however, the supposed intention of the parties every part of the submission must be looked to. If there be a clause empowering the arbitrator to make one or more awards at his discretion, the courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only, although the submission be in terms conditional, "so as such award or awards be made before a certain day," or so as the arbitrator shall make his award "concerning the premises;" for by such a submission the courts have held that though the parties give the arbitrator power to dispose of all matters in difference, they do not make it a condition to the validity of his decision on one subject that all matters should be disposed of by him (*e*).

Matter not notified as a matter in difference.

Notwithstanding the submission be expressly conditional with an "ita quod," no objection can be made to the award if the arbitrator determine all questions brought before his

(*b*) Cockson v. Ogle, 1 Lutw. 550; Risden v. Inglet, Cro. Eliz. 838.

(*c*) Wrightson v. Bywater, 3 M. & W. 199; Bradford v. Bryan, Willes, 268; Birks v. Trippet, 1 Saund. 32. See notes, p. 32, a; Bowes v. Fernie, 4 M. & C. 150.

(*d*) Simmonds v. Swaine, 1 Taunt. 554; Hide v. Petit, 1 Cas. in Chanc. 185.

(*e*) Wrightson v. Bywater, 3 M. & W. 199; Dowse v. Coxe, 3 Bing. 20.

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notice, though there are other matters within scope of the submission to which his attention has not been drawn (*f*). In order to invalidate the award for not deciding a particular question, the point must have been specifically stated. Thus, where an action of trespass for taking the plaintiff's goods as a distress for rent was referred with all matters in difference, and the main question before the arbitrator was, whether the plaintiff became a tenant of the defendant at a certain day, the court held that the award was good, although it did not decide, whether, at the date of the order of reference, a tenancy existed between the plaintiff and defendant, as that question was not specifically brought before the arbitrator for decision (*g*).

On a reference of all disputes respecting the right and interests of the parties under a deed of partnership, each of them contended before the arbitrator for a different construction of the clause regulating the amount of the profits which they were respectively to receive: though it was necessary for the arbitrator to put a construction on the clause in order to settle the balance between them, the court held that he was not bound to determine the effect of the clause in the award, as he was not specifically required to do so by the submission, or called upon by the parties to decide it as a separate matter in difference, but only to deal with it as a collateral question necessary to be disposed of with a view to the deciding the main question, the amount of the past profits (*h*).

II. *Award void if a matter left undecided.*]—Assuming the arbitrator, as is generally the case, bound by the submission to make a final determination on all the matters referred to him, it may be instructive to consider the consequences of the rule in particular instances.

Excepting

If an arbitrator determine all matter except one, which

(*f*) Middleton v. Weeks, Cro. Jac. 200.

(*g*) Rees v. Waters, 16 M. & W. 263; S. C. 4 D. & L. 567.

(*h*) Keene & Atkinson, In re, Exch., Ap. 16, 1847.

one matter on face of award.

in his award he particularly excepts out of his decision, and states he has not decided, and give liberty to one of the parties to prosecute that matter if he please, his award will be bad in toto, for it will thus be appearing on its very face that he has not performed his duty of deciding every question (*i*).

So, on a reference of all matters in difference between the parties to a chancery suit, instituted to enforce a pecuniary demand against the real and personal estate of a testator, where the arbitrators ordered one defendant, who was the executor, to pay a certain sum to the complainants in satisfaction of all demands on him or his testator, and directed that certain other defendants, who under the testator's will took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate in like manner as if no reference had been made, the Court of Chancery held the award void for not deciding the various claims existing between the co-defendants, on the ground that the intention of the order of reference was, that not merely the matters in difference between the plaintiffs on one side and the defendants on the other, should be determined, but that the individual rights of all the parties to the suit should be adjusted (*k*).

In like manner, where the arbitrators stated in their award that they had declined to arbitrate respecting a certain claim to an annuity, as they thought they were precluded from so doing by reason of a suit pending in Chancery concerning it, the court held, that as the reason for not deciding it was wholly untenable, the award was clearly defective in this respect, and therefore void altogether (*l*).

An award for the like reason was held void, where one of the matters in difference was, whether the defendant was entitled to an indemnity from the plaintiff against his, the defendant's, liability to pay a promissory note, of which he,

(*i*) Bradford v. Bryan, Willes, 268.

(*k*) Turner v. Turner, 3 Russ. 494.

(*l*) Bowes v. Fernie, 4 M. & C. 150. See Browne v. Meverell, Dyer, 216, a.

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the defendant, was the maker and the plaintiff an indorser, and the award as to this merely declared that the liabilities of the defendant on the note as between the plaintiff and defendant should remain unaffected by the award (*m*).

But an award that one should release to the other all actions and debts except bonds made for the performance of former awards, was held a good award as amounting to an award that the bonds should stand in full force, and not an excepting them from decision (*n*). So an award that all suits and actions should cease, and that all matters should be determined except concerning a certain bond, which was to stand in full force, was held a sufficient determination concerning all the controversies, and no disclaimer to meddle with any (*o*).

Awarding nothing due at present.

A cause having been referred with all matters in difference, the award deciding that the plaintiff had no cause of action, declared, that it was not intended to exclude him from the receipt of a certain commission, to which he would subsequently be entitled under an agreement; though it was objected that the award was not final, because the arbitrator had not settled the point about the commission, the court held it sufficient, on the ground that the award in fact said, that there was nothing due on that agreement at present, and that the arbitrator was only empowered to decide on matters in difference up to the date of the submission (*p*).

No loss at date of reference.

In a similar case, where the arbitrator recited in his award that the plaintiff had made a claim for a loss alleged to have been sustained on some hats, but had failed to prove that at the date of the order of reference he had sustained any such loss, adjudged that therefore the plaintiff under the reference was not entitled to recover anything in respect thereof; the court held this a sufficiently final determination of the claim, since it was an adjudication that up to the time of the

(*m*) Wilkinson v. Page, 1 Hare, Cas. in Ch. 276.

(*n*) Sallows v. Girling, Cro. Jac. 277.

(*o*) Berry v. Penring, Cro. Jac. 399.

(*p*) Harding v. Forshaw, 1 M. & W. 415.

order of reference nothing was due in respect of the hats (*q*).

Awarding matters not to be matters in difference.

If an arbitrator to whom a cause is referred recite on the face of his award that claims have been made by the plaintiff in respect of specified matters, and award in terms that these are not matters in difference in the cause, and therefore do not take them into the account, the court will, nevertheless, examine whether they are matters in the cause or not, and if they find them to be within the scope of the submission, will set aside the award as not being final (*r*).

Award showing matter undecided.

If the award recite several specific matters in difference, and as to one matter there be no specific adjudication, and the general words of the deciding part of the award cannot be construed so as to comprehend a decision on that particular subject, the award will be as invalid as if it expressly professed not to decide it.

As, for instance, where the recitals showed that the arbitrators had to determine all actions and controversies, and also to ascertain the rent to be paid by the plaintiff, and the arbitrators found the balance due from the defendant, but gave no direction respecting the rent, the court held the award void altogether for the omission as to the rent (*s*).

So, also, in a dispute upon a building contract where arbitrators were to award on alleged defects in the building on claims for extra work and deductions for omissions, and to ascertain what balance, if any, might be due to the builder in respect of the extras and omissions; the award, which ordered that the builder should be paid a gross sum, to be received by him as a compensation and satisfaction for all the matters in difference, was held bad, as it left undecided the question respecting the alleged defects, and it was doubtful whether the sum awarded was to be applied in discharge of the extra work or to a general balance of accounts (*t*).

(*q*) Cockburn v. Newton, 2 M. & G. 899.

(*r*) Samuel v. Cooper, 2 A. & E. 752. See Brophy v. Holmes, 2 Molloy, 1.

(*s*) Randall v. Randall, 7 East, 81.

(*t*) Rider & Fisher, In re, 3 Bing. N. C. 874.

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Awarding in one sum respecting all matters.

It is sufficient for an arbitrator to whom a cause and all matters in difference are referred, after duly determining the case, to award a gross sum in respect of the matters in difference not included in the cause, without in his award specifying what they are, for id certum est quod certum reddi potest, and on showing by parol evidence what the claims brought before the arbitrator were, the award will be final as to them (*u*).

Doubts were expressed by the court in the following case, whether the arbitrator ought not to have decided the cause separately from the other matters in difference. The submission, after reciting that "divers differences and disputes had arisen between the parties to the submission, and that an action of law had been commenced by the plaintiff against the defendants to recover a certain claim," referred "the said action at law and all other matters in difference between the parties" to the award of arbitrators, and it was thereby agreed that the parties should abide by the award of the arbitrators "of and concerning the said action, and also of and concerning all matters in difference between the said parties thereto." The costs of the action and all other expenses were to abide the event of the award, but the ordinary necessity of deciding the action for the purpose of showing who is entitled to the costs of it does not seem to have been of weight here in determining the court to refuse a rule to order the defendant to pay the plaintiff the sum awarded him generally (*x*).

Clerical error in description of subject-matter.

The arbitrator should be careful to make no mistake in describing a thing respecting which he is called upon to adjudicate, or inconvenience at least may arise. On a reference by indenture to ascertain (among other questions) "whether (the plaintiff) is now liable to discharge a sum of money secured by a mortgage executed by him to the testatrix on or about *the 29th Sept.* 1818," the arbitrator found that the plaintiff was not nor is "liable to discharge a sum of money secured by a mortgage executed by him to the

(*u*) Wrightson v. Bywater, 3 M. & W. 199.

(*x*) Rule v. Bryde, 1 Ex. R. 151.

testatrix on the 26th Sept. 1817, which was by the (defendant) produced to me as the mortgage in the said indenture mentioned as and by the (plaintiff) admitted to be the mortgage executed by the (plaintiff) to the said testatrix on or about *the 26th* of *December*, 1818." It was contended that the award was bad for not determining the liability of the plaintiff on the mortgage of the 29th Sept. 1818, but the court held that the award substantially decided the question, as only one mortgage was mentioned; and although the award described it improperly as of the 26th Dec. 1818, the difference in the date was to be looked upon as a mere clerical error (*y*).

An award of balance of set-off to defendant.

When an action of debt, to which the pleas are, never indebted, and set-off, is referred with all matters in difference, and the arbitrator finds both pleas in defendant's favor, the award on the face of it will not be final, unless it goes further, since by the finding the arbitrator shows that the plaintiff is indebted to the defendant. The award ought, therefore, to ascertain the amount of the defendant's claim, and direct the plaintiff to pay it (*z*).

Arbitrator making partition of land must direct conveyance.

If the arbitrator omit to give the necessary directions to effectuate the objects for which he is appointed, the award is not final. For instance, if several tenants in common, wishing to make partition of their land, covenant to abide by the award of an arbitrator as to their allotments, though the arbitrator allots the whole in separate portions to the several parties, the award will be bad, if he do not direct deeds of conveyance to be executed, to vest the allotments in the respective owners, for the property in the land cannot pass by virtue of the award alone (*a*).

The directions, generally, which an arbitrator should give in his award, are fully considered hereafter (*b*).

(*y*) Spooner v. Payne, 16 L. J., C. P. 225.

(*z*) Maloney v. Stockley, 2 Dowl. N. S. 122; S. C. 4 M. & G. 647; Williams v. Moulsdale, 7 M. & W. 134. See Fenton v. Dimes, quoted in Williams v. Moulsdale, 7 M. & W. 134.

(*a*) Johnson v. Wilson, Willes, 248.

(*b*) See P. 2, ch. 8.

Omission not on face of award.

If the fact that a matter submitted has not been decided, be brought before the court in any regular manner, as by plea or affidavit, according to the nature of the proceedings, the award will be deemed invalid, however good it may be on its face (*c*).

Not deciding ejectment.

Where, among the matters in difference brought before the arbitrator, there was an action of ejectment, on which the award did not decide; this fact appearing by affidavit, the court set the award aside (*d*).

Admitted demand is a matter in difference.

A demand made by one party before the arbitrator, admitted to be correct and due by the other, is a matter in difference, which the arbitrator ought to consider in estimating the ultimate amount awarded, though he be not in terms called upon to adjudicate respecting it, and the award will be set aside if he fail to do so (*e*).

Not claim abandoned.

But if a claim brought forward on the reference be afterwards abandoned, the arbitrator need not notice it in his award (*f*).

Claim to indemnity.

In another case the award was adjudged void, it appearing by plea that the defendants had made a claim before the arbitrator to be indemnified by the plaintiff against certain liabilities on some bills of exchange, and that the award did not decide respecting the claim (*g*).

In this case, it is to be observed, that there was an award of mutual releases to be executed, but as it was stated by Parke, B., on a subsequent occasion, that fact did not appear clearly by the plea on which the judgment proceeded, and at all events the attention of the court was not drawn to it (*h*); and the decision of *Birks* v. *Trippet* (*i*), as to the effect of an award of mutual releases, was not adverted to.

It must be shown matter not considered in award.

The award will not be avoided unless it be very clearly made out that the matter has not been considered in the award.

(*c*) Sallows v. Girling, Cro. Jac. 277.

(*d*) Stone v. Phillipps, 4 Bing. N. C. 37.

(*e*) Robson & Railston, In re, 1 B. & Ad. 723. See P. 2, ch. 2, s. 1, p. 118. as to what are matters in difference.

(*f*) Bird v. Cooper, 4 Dowl. 148. See P. 2, ch. 2, s. 1, p. 118.

(*g*) Mitchell v. Staveley, 16 East, 58.

(*h*) Wharton v. King, 2 B. & Ad. 528.

(*i*) 1 Saund. 32. See next division as to mutual releases.

Thus, where cross-actions and all matters in difference were referred, and the award decided on the actions, but was silent as to other matters in difference; and with a view to impeach the award, it was stated on the face of the return to a mandamus to enforce performance of the award, that there was a claim by the party making the return not included in the declaration of the action brought by him, which was brought before the notice of the arbitrator, it was held, the return did not show the award to be bad, although the award was silent as to matters out of the causes, as the return did not state that the claim was not used as a matter of defence to the action brought against the claimant, and therefore it might in that manner have been taken into consideration by the arbitrator (*k*).

Arbitrator must decide the question, not settle the case.

On a reference on the ordinary terms, the arbitrator must decide the very question submitted to him, and is not justified in lieu thereof in directing what seems to him an equitable arrangement on the whole. Therefore, on a reference respecting the right, title, interest, and possession of a certain parcel of land, an award that defendant should have the brakes growing in it for his life is bad, because the property in the land is not awarded, but only a profit out of it (*l*). So, on a reference of all questions relating to an agreement for the sale of land, and a question being raised on the sufficiency of the vendor's title, the duty of the arbitrator is to decide whether the title be good or bad, and an award that the purchaser shall take a conveyance of the title with all its faults, receiving an indemnity, is invalid, as not being a final settlement of the questions referred (*m*).

Omitting to decide as to all parties.

As the award must decide on all the matters, so it must decide respecting all the parties. Thus, if there be a submission of all controversies between A. & B. of the one part and C. of the other, an award of all between A. & C., omitting B., is void (*n*).

(*k*) R. v. St. Katharine Dock Company, 1 N. & M. 121. See the 7th division of this section as to the effect of the award being silent on a matter, p. 265.

(*l*) Anon. Dyer, 242, a.

(*m*) Ross v. Boards, 8 A. & E. 290.

(*n*) Com. Dig. Arb. E. 5; Harris v. Paynter, Rolle, Ab. Arb. O. 8, p. 261.

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Awarding on the cause and costs.

The proper mode of awarding on the cause referred (*o*), and as to costs (*p*), being fully discussed in the two following chapters, it is not requisite here to do more than to refer to those chapters as further illustrating the duty of making a final and certain award.

Award of mutual releases a decision of all matters.

III. *Effect of awarding mutual releases.*]—If on a submission of a cause and all matters in difference, the award order the defendant to pay the plaintiff a sum of money, and direct mutual and general releases to be executed, the award is final, although the arbitrator does not expressly adjudicate on some specific questions raised before him, as, for instance, on particular liabilities of the parties with respect to some bills of exchange, or on the liabilities in an action between them; for by the award of general releases he must be deemed to have taken into consideration the particular matters in difference, since the releases would operate as a final determination respecting them (*q*).

But where the arbitrator stated on the face of his award that he had, for certain reasons which the court held untenable, refused to arbitrate on certain claims within scope of the submission, his proceeding to direct the parties to execute mutual general releases respecting the matters submitted was not held to cure the defect, since if the award were not set aside the result would be most unjust, in directing the general releases, as they would prevent the party for ever from enforcing those claims which the arbitrator had declined to investigate (*r*).

Intendment in favor of award.

IV. *Rule awarding de præmissis.*]—The courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favor of its

(*o*) See P. 2. ch. 6.
(*p*) See P. 2, ch. 7.
(*q*) Birks v. Trippet, 1 Saund. 32; Wharton v. King, 2 B. & Ad. 528; Addison v. Gray, 2 Wils. 293.
(*r*) Bowes v. Fernie, 4 M. & C. 150. See Wilkinson v. Page, 1 Hare, 276.

being a final, certain, and sufficient termination of the matters in dispute (*s*).

Award "de præmissis" presumed final.

To this end the following rule of construction has for a very long period been universally adopted—that when an award purports to be made "de præmissis," or "of and concerning the premises," that is, concerning the matters referred by the submission, if the terms of the awarding part be general and large enough to apply as a comprehensive decision of all the different specific matters submitted, the award is taken primâ facie to be a decision of all and of nothing more; while if the adjudication apply in terms to a particular matter only, though the submission be of all matters in difference, the award will be presumed good, until it be proved that there were other matters before the arbitrator to which the limited adjudication cannot be construed to apply (*t*).

Award purporting to be on all matters an award de præmissis.

According to the more liberal construction of later decisions, the award need not now in terms profess to be made "of and concerning the premises," or formally express that the arbitrator adjudicates on every matter in difference, if it appear on the face of the instrument that it is an award on all the matters submitted (*u*). If the arbitrator state in his award, "Having considered the allegations of the parties and the evidence touching the matters in difference, I award," &c., this purporting to be an award touching the matters in difference, is equivalent to an award of and concerning the premises, which will be presumed to be final as to all the matters submitted to the arbitrator until the contrary be shown (*x*).

(*s*) Wood v. Griffith, 1 Swanst. 43; Hawkins v. Colclough, 1 Burr. 275; Bowes v. Fernie, 4 M. & C. 150; Doe d. Madkins v. Horner, 8 A. & E. 235; Stonehewer v. Farrar, 9 Jur. 203.

(*t*) Knight v. Burton, 6 Mod. 231; Baspole's Case, 8 Coke, 97, b; Veale v. Warner, 1 Saund. 323, e. note, p. 324; Bradford v. Bryan, Willes, 268. Rolle, Ab. Arb. L. p. 256; Risden v. Inglet, Cro. Eliz. 838; Middleton v. Weeks, Cro. Jac. 200.

(*u*) Brown v. Croydon Canal Company, 9 A. & E. 522.

(*x*) Craven v. Craven, 7 Taunt. 642; Baspole's Case, 8 Coke, 97, b; Bradford v. Bryan, Willes, 268; Rolle, Ab. Arb. L. p. 256; Risden v. Inglet, Cro. Eliz. 838; Middleton v. Weeks, Cro. Jac. 200.

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v. *Award de præmissis general finding presumed final.*]—A few illustrations of the effect of the general terms of an award being held a decision of the specific matters will here be given.

Awarding a gross sum on all matters.

A canal company agreed to pay an engineer an annual sum for a term of years for the use of an engine constructed by him, and for his services in managing it. In the course of the term disputes arising, the parties put an end to the agreement, and referred all matters in difference between them to arbitration. On the reference, the engineer sought to recover (among other things) for unpaid instalments of the sum agreed on, and also claimed a compensation for future loss in respect of the part of the term unexpired. The company stated a set-off. The arbitrators, by their award, reciting the submission bonds, and that they had fully heard and maturely considered all the evidence produced by each, and investigated all the accounts and vouchers produced touching the matters in difference referred to them, awarded (but not saying that they did so "of and concerning the premises") that there was due to the engineer from the company a certain sum, which they directed the company to pay him. The court held this award to be a sufficiently certain and final decision of all the matters in difference, and that it was not necessary to specify each item of compensation, or to say how much was awarded in respect of the existing debt, and how much for contingent damages, or to make any allusion to the set-off; but that the arbitrators were entitled to fuse the whole claim into one set of damages, and, deducting what they thought due on the set-off, to state the balance alone in their award (*y*).

An agreement of reference reciting, that an action had been commenced in Scotland against a navigation company respecting certain goods shipped by the complainant on board of the company's vessels, which goods, it was alleged, had not been delivered, that the action was brought to recover the goods or their value, the damages occasioned by

(*y*) Brown & Croydon Canal Company, In re, 9 A. & E. 522.

the non-delivery, and the costs of the action, referred the above matters to arbitration. The costs of the reference and award, and also of the Scotch action, were left in the discretion of the arbitrators. The arbitrators awarded "of and concerning the matters referred," that a certain amount was due from the company to the complainant, which, together with another sum which the arbitrators stated to be for the costs of the reference and award, they directed the company to pay him. The court (Parke doubting) held the award sufficiently decided all the matters in difference, as the sum awarded generally must be understood to have included the costs of the Scotch causes as well as the other matters in difference, though it would have been better if the award had distinctly specified the matters in respect of which payment was adjudged (*z*).

In another case, differences existed between the parties respecting the portion each was by agreement between them to pay of the sum of £2,500, for which judgment had been previously recovered against the plaintiff by a stranger, and also respecting the value of the goods and stock which each had received from a farm, and concerning the costs of certain actions. These they referred to arbitration. The arbitrators reciting that they had taken the matters in difference into their consideration, awarded that all disputes between the parties should cease, that the defendant should pay the plaintiff £444, that the plaintiff should pay five-eighths and the defendant three-eighths of the costs of the actions, and that all such sums as either party should have expended on account of the actions should be deemed as part payment of their respective shares, and that the parties should execute mutual releases. The court held the award sufficiently final, as they would presume that the arbitrators meant that £444 was the proportion the defendant was to pay, taking the £2,500 and the value of the goods and stock into consideration, and that it was unnecessary to direct the plaintiff to pay the remainder of the £2,500, as he was bound to do that already (*a*).

(*z*) Gillon & Mersey Navigation Company, In re, 3 B. & Ad. 493.

(*a*) Cargey v. Aitcheson, 2 B. & C. 170.

In an old case, where the arbitrator in his award reciting differences concerning a house, and some elms, and arrears of rent, to make a final end of all, directed the defendant to pay the plaintiff a certain sum for all the said arrears of rent, the court, though it was objected that only one matter was determined and not all, held the award good, on the ground that though the award recited other matters, it should be intended they were otherwise determined: or at least when the award professed to make an end of all differences, it should be intended that the sum awarded was in satisfaction of all, the other matters not appearing but by the recital of the award itself (*b*).

VI. *Award de præmissis particular finding presumed final.*]—A few examples will now be given illustrating the position previously laid down, that where an award purports to be made concerning the matters submitted, the courts will construe a particular adjudication to be final, though the submission be general.

General reference award respecting banking account.

On a general reference of all actions, suits, controversies, and demands, the arbitrators by their award reciting that they had considered the allegations and evidence of all parties concerning the premises, proceeded to award that all actions and suits pending between the parties should cease, and directed payment by the defendant of a certain sum of money which it stated to be "the balance due on the banking account of the defendant with the plaintiffs." It was objected that this was a settlement of one matter only, and not of all. But the court said, if it could be shown that there was any other matter in difference between these parties than the banking account, the award could not be sustained in any respect; but they thought it lay on the party who impeached it to show there was some other matter in difference; and that otherwise they could not intend it, though the reference was of all matters in difference between the parties (*c*).

(*b*) Hopper v. Hackett, 1 Lev. 132.

(*c*) Ingram v. Milnes, 8 East, 444.

Ordering release to day before submission.

An award made de et super præmissis, that the parties shall execute mutual releases of all actions and demands before a certain day, is good, though that day be before the day of the date of the submission, for the court will not presume that any new controversies arose in the intervening period: but if it be shown that any new demands arose in the interval the award will be void in toto (*d*).

Award on cause only.

If, on a reference of all controversies, the award be made de præmissis, and merely contain an adjudication respecting one action between the parties, this will be held final, for it will be intended that the award is made of all matters submitted to the arbitrator, and it need not state that there were no other matters in difference than the matters in the cause (*e*).

Thus the court supported as final an award on a reference of all actions, controversies, and suits, which, after reciting the pendency of one action, awarded de et super præmissis, that each party should pay his own costs, and that the defendant should pay the plaintiff five shillings for making the first breach in the law (*f*). So, if a cause and all matters in difference be referred, and the award purporting to be concerning the matters in difference only, direct that the defendant shall pay the plaintiff a certain sum in full of all demands in the cause, this will be held sufficiently final, if it be not proved that there are other matters out of the cause on which the arbitrator has omitted to award (*g*).

Award silent, decision sometimes presumed.

VII. *Whether matter presumed decided when award silent.*]—Even where it has been proved that there were other matters in difference before the arbitrator than those on which the arbitrator has adjudicated, the rule of presuming in favor of the sufficiency of the award has been carried so far

(*d*) Ward v. Uncorn, Cro. Car. 216; Busfield v. Busfield, Cro. Jac. 577; Barnes v. Greenwel, Cro. Eliz. 858.

(*e*) Baspole's Case, 8 Rep. 97, b; Wyatt v, Curnell, 1 Dowl. N. S. 327.

(*f*) Hawkins v. Colclough, 1 Burr. 275.

(*g*) Day v. Bonnin, 3 Bing. N. C. 219; Wynne v. Edwards, 12 M. & W. 708.

that his silence respecting them has, in many instances, been held not to make the award bad, but somehow to amount to a decision concerning them.

An award was sustained, where, on a reference respecting some causes and all matters in difference, the arbitrator, reciting that he had considered all the evidence and papers touching the matters in difference, awarded respecting the actions only, although it appeared that the plaintiff had set up an equitable claim, which the arbitrator did not notice, deeming it wholly unsustainable (*h*).

By order of Nisi Prius, an action for a tort and all matters in difference were referred, and a verdict was taken for the plaintiff, subject to the reference. Before the arbitrator, the defendant claimed a sum as the balance of an account, which sum the plaintiff admitted to be due. The award reciting that all matters in difference were referred, awarded (though not saying de præmissis) that a verdict should be entered for the plaintiff for a certain amount of damages, but made no mention of the sum admitted to be due to the defendant. The court held, that it sufficiently appeared from the award that the arbitrator had decided concerning all the matters referred to him, and said that if he had used in the award the words, de præmissis, there could have been no doubt upon the subject; for they considered that the fair interpretation to be put on the award was, that the arbitrator gave as damages the sum which he found to be due after settling all accounts between the parties (*i*).

In close accordance with the above decision is the following case. On a reference of an action for the balance of the price of some horses, together with all matters in difference, the defendant made a claim before the arbitrator for an alleged breach of warranty of the horses' soundness; the arbitrator awarded "of and concerning the matters in difference," that the plaintiff had no cause of action against the defendant, but was silent respecting the defendant's claim; the court held the award sufficient, and said they would pre-

(*h*) Craven v. Craven, 7 Taunt. 642.

(*i*) Gray v. Gwennap, 1 B. & A. 106.

sume the arbitrator took the claims of both parties into his consideration (*k*).

In a more recent case, however, where a cause and all matters were referred, the arbitrator found specifically on each of the issues in the action, determining in favour of the defendant the issue on a plea which went to the whole cause of action. The award took no notice of a claim by the plaintiff respecting a matter in difference not in the action, though the arbitrator swore that he had taken it into his consideration. The court, on the strength of the authorities, especially of that of *Gray* v. *Gwennap* (*l*), held that they could not set aside the award for this omission, Lord Abinger, C. B., however, saying that had the matter been res integra, he should have been disposed to have thought the award void, and that as the award was in writing, its silence as to any matter in difference brought before the arbitrator, prevented it from being a sufficient exercise of the authority vested in him by the submission (*m*).

Award silent, sometimes not presumed a decision.

Struck with the inconvenience of the rule, that silence amounts to a decision, the courts have sometimes refused to adopt it. For where, by the submission of a cause and all matters in difference, the arbitrator was to direct a verdict to be entered for such amount of damages as he should find due in the cause, and the award made "of and concerning the matters referred," found that the plaintiff was entitled to recover damages to a certain amount, and directed a verdict to be entered for that amount, and it appeared by affidavit that on the reference the plaintiff made a claim not included in the cause, on which claim no award was made; the court held that the award was not final, and set it aside, since the finding could be taken to apply only to the sum claimed in the cause, and that consequently there was no decision as to the matter in difference out of the action; that the court would not intend that the arbitrator by his silence meant to find that nothing was due in respect of it; since such an

(*k*) Hayllar v. Ellis, 3 M. & P. 553.

(*l*) 1 B. & A. 106.

(*m*) Dunn v. Warlters, 9 M. & W. 293.

intendment was unreasonable and unfounded; and that holding silence a sufficient determination that the plaintiff had no claim, would expose the defendant to the inconvenience of not having that protection by the award against a second action for the same matters in difference, which it was one object of the reference to give him (*n*).

In a case before Lord Ellenborough, C. J., when on a general reference the defendant set up a claim to be indemnified against a liability on certain bills of exchange, and the award did not notice the claim, the court construed the silence of the arbitrator to amount to an omission to decide the point, and held the award bad in consequence, although it purported to be made touching the matters in difference (*o*).

VIII. *Conditional award.*]—An award leaving the result conditional on the voluntary performance by one party of some particular act for the benefit of the other, seems generally open to the objection of not being final (*p*). The remarks of Lord Brougham in the following case point out what sort of a condition may properly be imposed in certain cases.

Event conditional on voluntary act.

An action was brought by a subscriber against a company for the value of his shares, on the ground that they had engaged in speculations foreign to their original undertaking. The company having brought a cross action for calls, both were referred; and the arbitrator, among other things, awarded that the subscriber was entitled to decree for a certain specified sum as the price of his shares, which sum, after deducting what was awarded for the calls, the award proceeded to find that he was entitled to receive from the company on surrendering or transferring his shares to them, or to any person they might direct. The House of Lords held the award not to be final, since it merely said

(*n*) Gyde v. Boucher, 5 Dowl. 58.

(*o*) Mitchell v. Staveley, 16 East, 127.

(*p*) Crofts v. Harris, Carth. 187.

conditionally that if the subscriber chose to give up his shares, the company should pay him so much, that the direction should have been in positive terms that the subscriber should surrender his shares, and that the company should pay him the compensation awarded; and Lord Brougham said, "It is in vain to argue that this direction was the same as a direction to a party to do so and so upon another party producing letters of administration, or that it was like the case of a party who is directed to do so and so upon a discharge being executed to him." "There was no necessary connexion between the arrangement which the arbitrator was in the course of directing, and [the subscriber] divesting himself of his property in ceasing to be a shareholder" (*q*).

On a reference respecting a claim by the plaintiff for work done, an award that the work done was rated at a certain sum, and that for that the plaintiff should accept a bill of sale of a part of a ship, was considered bad, for not directing the defendant to give the bill of sale in question, on the ground that if the defendant refused to deliver it, the plaintiff could not assign a breach of the award, and that the court could not imply any order to deliver, so as to make the award good by implication (*r*).

But an award, "that one shall keep and enjoy the goods, paying so much money to the other," though objected to on the ground that there was no positive direction to pay the money, was held good as amounting to an award to pay the amount (*s*).

Conditional direction valid.

A conditional direction in an award, otherwise final, is often perfectly valid. Thus a direction to do an act on the premises of a third party, though void if absolute, as rendering a party liable to an action of trespass, is perfectly good if it be made conditional on obtaining the consent of the owner of the land (*t*). So where the lease of certain

(*q*) Baillie v. Edinburgh Oil Gas Company, 3 C. & F. 639.

(*r*) Clapcott v. Davy, 1 Ld. Raym. 611.

(*s*) Stiles v. Triste, 1 Sid. 54.

(*t*) Turner v. Swainston, 1 M. & W. 572. See P. 2. ch. 8, s. 4, d. 3.

premises was awarded to the defendant, and it was provided that if the rent awarded to be paid by him were not paid, the award should be void as to his enjoying the lease; the court held the award good, notwithstanding the conditional award as to the lease, for it became absolute if the defendant paid the rent, and if he did not, he lost the enjoyment by his own default (*u*).

Award conditioned to be void on event.

If an award contain a proviso that it shall be wholly void on the happening of a certain event, whether that event be within the control of the parties to the reference or not, the award will be bad in toto, for by adding the proviso, the arbitrator has prevented his decision being a certain and final termination of the matters in dispute. Thus, where it was awarded that one should pay the other so much money, and that the latter should give the former a release, provided that if the first should be discharged of any arrears due to soldiers by an act of indemnity, then the award should be void;—the award was held not final (*x*): and the like result followed where the award provided that if either party were dissatisfied with the award, and within a specified time paid a small sum to the other, the award should be void, and the parties be at liberty to proceed against each other as before the award (*y*).

Alternative award good.

IX. *Award in the alternative.*]—An award in the alternative is sufficiently certain and final.

Thus an award to pay £100 at such a day, or if the party do not pay it by the day, to pay £110 at a future day, is good, for the additional payment is in the nature of a penalty, which the arbitrator has a power to impose (*z*). So an award is good which orders a party to pay a certain sum by instalments on several days, and if he fail on the first day, to pay the whole sum immediately afterwards (*a*).

(*u*) Furser v. Prowd, Cro. Jac. 423.

(*x*) Kinge v. Fines, Sid. 59; Vin. Ab. Arb. H. 18.

(*y*) Sherry v. Richardson, Pop. 15.

(*z*) Royston v. Rydall, Rolle Ab. Arb. H. 8, p. 250; Com. Dig. Arb. E. 15.

(*a*) Knockill v. Witherell, 2 Keb. 838.

So on a difference respecting a right of way, the award was sustained, which directed that in case the way were taken away, the plaintiff was to pay so much less than a specified sum, and if not so much more (*b*).

One alternative uncertain or impossible.

If an award direct one of two things to be done, and one of them is uncertain or impossible, the award is nevertheless sufficiently certain and final, if the second alternative be certain and possible; and it will be incumbent on the party to perform the second alternative (*c*); as, for instance, if the direction be that defendant should cause satisfaction to be entered on the judgment-roll in a certain action, or pay a sum of money, and there be no such action in fact, the award is good to compel the defendant to pay the money (*d*). So, if it be to deliver a deed which is not in his power or possession, or to pay a sum of money, the party must perform the alternative of paying the money, which is within his power (*e*).

An award that defendant should pay the plaintiff £100 by such a day, or should find two sureties to be bound with him to the plaintiff to pay the £100 by £20 a year, until the whole be paid, was held a good award as to the former part, but void as to the latter, and not even to give the defendant the liberty of electing whether he would pay the £100 at once, or find the sureties to secure the yearly instalments (*f*).

Arbitrator cannot reserve or delegate authority.

x. *Award reserving or delegating judicial authority.*]— An arbitrator cannot in his award reserve either to himself, or delegate to another, the power of performing in future any act of a judicial nature respecting the matters submitted (*g*).

(*b*) Collet v. Podwell, 2 Keb. 670.

(*c*) Simmonds v. Swaine, 1 Taunt. 548.

(*d*) Wharton v. King, 2 B. & Ad. 528.

(*e*) Lee v. Elkins, 12 Mod. 585.

(*f*) Oldfield v. Wilmer, 1 Leon. 140, 304.

(*g*) Winch v. Saunders, 2 Rolle Rep. 214; S. C. Cro. Jac. 584; Palmer, 145; Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457; Com. Dig. Arb. E. 16; Selby v. Russell, 12 Mod. 139; Nott v. Long, 9 G. II. B. R., cited in Cayhill v. Fitzgerald, 1 Wils. 28.

His duty is to make a final and complete determination respecting them by his award, and it is a breach of that duty to leave anything to be determined hereafter.

Reservation by arbitrators to themselves.

Thus an award directing the defendant to leave on certain land so many trees to the plaintiff for house-bote and hedge-bote, as the arbitrators, upon advice with counsel at the next assizes, should appoint, was held void as imperfect, and reserving a future authority to themselves (*h*).

Where the award ordered the defendant to pay a sum to the plaintiffs, with a proviso that if it should afterwards appear to the arbitrators that the plaintiffs had not discharged the defendant from certain debts, in which he was bound for them, that so much of the sum should be repaid to them as to the arbitrators should seem due; the award was considered bad, for these words, "if it should appear," were construed to be a retention by the arbitrators to themselves of a discretionary power of judging hereafter (*i*).

When award good, though reservation void.

Sometimes, however, the award may be good, though the reservation be void. An arbitrator, to whom power was given to award respecting the use of a stream, decided the question referred, and ordered certain works to be made by the defendant, but contemplating in his award the possibility of differences arising respecting the execution of the works, he reserved to himself the power of deciding them, and then making a final award, stating at the same time that his present award was final, unless the plaintiff complained within a certain time. The court held the revocation of authority void, but the rest of the award good, as it contained a final decision on the matters referred (*k*). The reservation, it will be seen, was not a reservation of authority to decide on any of the subject-matters of the reference, but on matters not submitted, consequently the reservation was a mere excess of authority.

Arbitrator cannot delegate.

In pursuance of the rule which forbids the delegating a judicial authority, the award is bad if the arbitrators, in-

(*h*) Thinne v. Rigby, Cro. Jac. 314.

(*i*) Winch v. Saunders, 2 Rolle Rep. 214; S. C. Palm. 145.

(*k*) Manser v. Heaver, 3 B. & Ad. 295.

stead of deciding the matters submitted, award that the parties shall abide by the award of a third person whom they name (*l*); or that the defendant shall account before such auditors as the plaintiff shall assign, and if he be found in arrears, shall pay the amount (*m*).

Partial delegation.

A partial delegation of authority equally vitiates the award; as, for instance, if on a reference to settle the terms and conditions of a lease of certain premises, the arbitrators direct them to be put into repair to the satisfaction of a person named in the award; for that amounts to a transferring to the party named a portion of the authority vested in themselves (*n*).

Delegating to party.

An award that the defendant should pay to the plaintiff a certain sum, unless within a definite time the defendant should exonerate himself by affidavit from certain payments and receipts, in which case he was to pay a less sum, was held bad by Lord Kenyon, on the ground that the arbitrators, instead of determining all the points in dispute, had left one sum in dispute, to be decided by the person who, of all others, was least qualified to decide it, namely, the defendant himself (*o*).

So when the arbitrator directed that A. should pay B. £50, and that A. should beg B.'s pardon in such manner and in such place as B. should appoint, the award was held void as to the latter direction, because giving B. the power to determine the time and place, was making him a judge in his own cause, which the arbitrator ought to have determined; and though time and place were but circumstances, yet in that sort of satisfaction they make the most considerable part (*p*).

Exception, delegating to the Master the taxing of costs.

There seems to be an exception to the rule against delegating authority in respect of costs. For an award, which directs the payment of such costs as shall be taxed by the officer of the superior court which has cognizance of the

(*l*) Lower v. Lower, Rolle Ab. Arb. B. 20; Rolle Ab. Arb. H. 11.
(*m*) Rolle Ab. Arb. I. 9.
(*n*) Tomlin v. Mayor of Fordwich, 5 A. & E. 147.
(*o*) Pedley v. Goddard, 7 T. R. 73; See Rous v. Lun, 1 Keb. 569.
(*p*) Glover v. Barrie, 1 Salk. 71.

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submission, is undoubtedly good (*q*), though if the award direct the costs to be taxed by one not an officer of the court, it will be bad, as delegating a judicial authority, even where it provides that the costs shall be such as a Master in Chancery would allow. Though a reference to a stranger is judicial, yet it seems the officer of the court, in taxing costs, is considered as acting in a ministerial capacity only (*r*). If this be so, this class of cases, which has been termed an exception to the general rule, would fall properly into the class next considered. Before leaving this subject, it may be observed, that it is only to causes in the superior courts that this exception applies, for the arbitrator must ascertain for himself the amount of costs in a cause in an inferior court, and cannot delegate that duty to the officers of the inferior court (*s*).

Arbitrator may reserve or delegate ministerial duties.

XI. *Award reserving or delegating ministerial duty.*]—An important distinction has been taken by the courts, that though the arbitrator cannot reserve a further *judicial* act to be done, he may reserve a further *ministerial* act to be done either by himself or a stranger, at any time, even after the time limited for making the award has expired (*t*).

Measurement of land.

Whether the matters are referred to be finally decided by the arbitrator, or whether he is simply to make a valuation of certain landed property, after ascertaining in his award the rate to be charged per acre, he may direct the number of acres to be ascertained by measurement, for measuring is a merely ministerial act (*u*).

(*q*) See post, p. 281. Selby v. Russell, 12 Mod. 139; Lingood v. Eade, 2 Atk. 501; Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457; Pedley v. Goddard, 7 T. R. 73; Worrel v. Atworth, Sid. 358; Cargey v. Aitcheson, 2 B. & C. 170.

(*r*) Knott v. Long, 2 Strange, 1025.

(*s*) Addison v. Gray, 2 Wils. 293.

(*t*) Winch v. Saunders, 2 Rolle Rep. 214; S. C. Palm. 145; Cro. Jac. 584; Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457.

(*u*) Thorp v. Cole, 4 Dowl. 457; S. C. 2 C. M. & R. 367; Winch v. Saunders, 2 Rolle Rep. 214; Hunter v. Bennison, Hard. 43.

Where the arbitrators to whom it was referred to fix the price of an estate, stated in their award the sum to be paid, and the number of acres in the whole estate, and added, that if there were any error in the admeasurement, an allowance should be made at the rate of a certain amount per acre, either less or more than the admeasurement, if the mistake were in the land on one side of a brook, but an allowance of twice the amount per acre if the mistake were in the land on the other side; the court held that the award was not certain and final, as the arbitrators had not stated how much of the estate they considered lay on each side of the brook respectively, so that there were no means of ascertaining to what extent the double rate per acre, for additions and deductions, or to what extent the single rate only was to be allowed. The court however added, that if the addition or deduction upon admeasurement had been to be made at a uniform rate per acre as to all the land, the award, according to the rule "id certum est quod certum reddi potest," would have been good (*x*).

Whether valuer ministerial officer.

In an old case two judges were of opinion that a reservation of a power to value certain goods was a reservation of a judicial power, and therefore void; Powell, J., however, thought it merely ministerial. The award being bad on other grounds, it did not become necessary to determine the point (*y*). In more recent cases, a valuer's functions have been treated as of a judicial character (*z*).

Reserving power to settle deeds.

Arbitrators often direct the parties to execute bonds, releases, or other documents, to be settled by themselves or others. Such a direction will sometimes avoid the award, sometimes not, according as in each case it is treated as a reservation of a judicial or ministerial duty.

Reservation to arbitrator.

A reservation to the arbitrator is generally construed to be judicial. Thus it has been held, that if arbitrators award that the defendant shall pay the plaintiff a sum certain, and

(*x*) Hopcraft v. Hickman, 2 S. & S. 130. 550.

(*y*) Cockson v. Ogle, 1 Lutw. 550.

(*z*) Anderson v. Wallace, 3 C. & F. 26. See ante, p. 202.

in security for the payment shall execute such a bond as they shall advise (*a*); or that defendant shall secure the payment of such a sum to the plaintiff in such a manner as they shall advise, the award is invalid (*b*).

Reservation to stranger.

So also a direction to execute such bond by way of security for the sum awarded, or such releases as a stranger shall advise, has been considered equally bad (*c*), though the distinction in principle between these and the next class of cases does not seem very clear. And it may be observed that an award that one shall release to another, by the advice of J. S., has been held good (*d*).

Reservation to counsel.

If the direction be that one party shall execute to the other such a bond, by way of security for the amount, as his opponent's counsel shall advise, or if the award direct that the one shall execute to the other a general release, as fully and beneficially as counsel shall advise, the award has been held to be good; for it is said that the delegation to the counsel in either case is not a delegation to him as arbitrator, and that he has no power to perform any judicial act, but acts in a ministerial capacity only, for the arbitrators having directed the extent of the bond and release, the counsel has only to make them as strong in law as he can (*e*). Where, in order to decide the title to certain land, the arbitrator awarded that an action should be conceived by the advice of certain counsel, this was held to be a reference to their judgment, not on the substance, but only on the form (*f*).

The following case illustrates the rule that only the formal drawing up of the instrument may be deputed, and that the award must determine its nature and character. On a reference respecting the right to a certain house and premises, the award which directed certain parties to execute to another party all such conveyances, releases, and assurances,

(*a*) Rolle Ab. Arb. H. 4, p. 250.

(*b*) 19 E. IV. 1, cited in Hunter v. Bennison, Hard. 43.

(*c*) Rolle Ab. Arb. H. 6, p. 250; Emery v. Emery, Cro. Eliz. 726.

(*d*) Anon. Jenk. 3d. cent. case 61, p. 129.

(*e*) Cater v. Startut, Rolle Ab. Arb. H. 7, p. 250; S. C. Sty. 217; Jenk. 129.

(*f*) Brooke Ab. Arb. 37.

as might be necessary to pass their respective interests to him, was held void in toto, because it did not specify the manner in which the conveyance was to be effected, but reserved to the arbitrator, in case of dispute, a power to appoint a counsel or solicitor hereafter, to decide as to what should be the proper conveyances, releases, or assurances, and as to the clauses, provisions, and covenants they were to contain (*g*).

If the arbitrators, on a reference out of Chancery, award mutual releases of all matters in difference, the leaving it to the court, if they think proper, to give directions to the Master to settle the form, will not make the award bad (*h*).

SECTION V.

THE AWARD MUST BE CERTAIN.

Certainty to a common intent.

1. *What certainty requisite.*]—An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties.

Certainty to a common intent only is sufficient, for the award will be construed by no technical rules, but in a fair and liberal spirit, with a view to support it as far as a sensible and reasonable interpretation will allow (*a*).

Certainty as to time.

If the arbitrator direct one party to pay money, or to execute a release to the other, the award is sufficiently certain, though it mention no time; for if a request to do the act be necessary, it must be done in a convenient time after the

(*g*) Tandy v. Tandy, 9 Dowl. 1044.

(*h*) Lingood v. Eade, 2 Atk. 501.

(*a*) Hawkins v. Colclough, 1 Burr. 275.

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request, if there need no request, it must be performed in a reasonable time (*b*). If the award be without a date, and the arbitrator direct a party to do a thing a certain number of days after the date of the award, this will not be so uncertain as to be invalid, for the date will be computed from the delivery of the award (*c*).

Award without date.

As to place.

The arbitrator need not specify any place for the payment of money awarded (*d*).

When doubtful whether matter decided.

If it be doubtful whether the award has decided the question referred, it will be set aside for the uncertainty.

Hence, where a Chancery suit had been brought to rescind an agreement, and the main question in the reference was, whether the agreement should be rescinded, and the suit put an end to, and the arbitrator directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference, and that each party should bear his own costs of the suit, the award was set aside, inasmuch as the directions of the arbitrator did not clearly determine whether the agreement was to be rescinded and the suit terminated (*e*).

When doubtful how matter decided.

The award will be equally invalid, if it be uncertain how it has decided the matters referred.

When on the reference of a cause and all matters in difference, a verdict was taken in the cause for a specified amount of damages, subject to the award of an arbitrator, and he was empowered to order a verdict for the plaintiff or the defendant, as he might think proper, and the arbitrator directed a verdict to be entered for the plaintiff, (not saying for how much,) and that the defendant should pay the plaintiff a certain sum, the court held the award bad, as it was uncertain whether the arbitrator meant the verdict to stand for the sum originally taken, and the amount directed to be paid by the defendant to be in respect of the matters out of the cause, or whether he intended the sum ordered to

(*b*) Freeman v. Bernard, 1 Salk. 69.

(*c*) Armitt v. Breame, 2 Ld. Raym. 1076; S. C. 1 Salk. 76.

(*d*) Anon. 1 Keb. 92; S. C. 2 Brownl. 309.

(*e*) Tribe & Upperton, In re, 3 A. & E. 295.

be paid by the defendant to be substituted for the nominal verdict (*f*).

No finding as to assets.

An award directing an executor to pay the balance due from his testator out of the assets in his hands is sufficient, though it does not ascertain whether there are any assets in his hands (*g*).

Awarding separately on separate matters.

As the question whether the arbitrator has with sufficient particularity decided all the matters submitted to him, arises as naturally on the objection that the award is not final, as on the objection that it is not certain, the reader is referred to the previous section for information on the point how far it is necessary for the arbitrator to decide separately on separate matters (*h*).

II. *Certainty as to the amount awarded.*]—When the arbitrator directs anything to be done, he must give his directions with such precision that the parties may know at once what they are to do.

Arbitrator must fix precise amount to be paid.

If he order a sum of money to be paid, the award must ascertain the amount; therefore an award is bad that orders one party to pay the other so much money as is due in conscience, without settling what is due (*i*); or so much as such land is worth, the value of the land being undetermined (*k*); or the money due for task work, without ascertaining the amount owing in that respect (*l*); or to pay the arrears of rent accruing due after the purchase by a stranger of certain lands, without showing what the arrears are, or from what period they are to be calculated (*m*); or to pay a moiety of a debt for which A. is bound, without saying in what sum (*n*); or to pay so much for every quarter of malt as

(*f*) Mortin v. Burge, 4 A. & E. 973.

(*g*) Love v. Honeybourne, 4 D. & R. 814.

(*h*) See P. 2, ch. 5, s. 4, dd. 2, 5, 7; See also P. 2, ch. 6, as to awarding on a cause; P. 2, ch. 7, as to awarding in respect of costs.

(*i*) Watson v. Watson, Sty. 28.

(*k*) Titus v. Perkins, Skin. 247, per Jones, C. J. 248.

(*l*) Pope v. Brett, 2 Saund. 292.

(*m*) Massey v. Aubry, Sty. 365.

(*n*) Gray v. Gray, Rolle Ab. Arb. Q, 2, p. 263; Com. Dig. Arb. E. 11.

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malt may then be sold for, without saying in what place, for the price of malt may vary in different markets (*p*).

When arbitrator to allow at market price.

But where the parties had agreed that in case the arbitrator should think the plaintiff not entitled to recover in respect of some articles of iron machinery supplied to the defendant, the arbitrator was to allow the plaintiff the value of them at the market price of pig iron, as the defendant still kept them, the award directing the defendant to pay for them according to the present market price of pig iron was held good, and to have sufficiently ascertained the price, because, according to the agreement of the parties, the arbitrator was, in fact, merely to determine whether the defendant was to pay for them as machinery or as pig iron (*q*).

Awarding sufficient to release securities.

When the submission, among other things, provided that the arbitrator should direct the plaintiff to pay into a bank such a sum of money as would be sufficient to entitle the defendant to have restored to him some documents deposited by him with the bank as a security for advances, and the arbitrator, following the submission, awarded that the plaintiff should pay to the bankers such a sum of money as would be sufficient to entitle the defendant to have his securities restored to him; the court held the award bad, for not ascertaining and directing payment of the exact amount due to the bankers, and necessary to be paid in order to release the defendant's securities (*r*).

To pay over money received, if any.

So, where on a reference between assignees of a bankrupt and a banking company respecting some bills of exchange, the arbitrator awarded that the bills and monies secured thereby were the property of the assignees, that the bills, and monies, and proceeds should be delivered and paid to the assignees, and that in case the bank should have received the whole or any part of the money secured by the bills, they should pay it to the assignees, the award was held

(*p*) Hurst v. Bambridge, Rolle Ab. Arb. Q. 7, p. 263; Com. Dig. Arb. E. 11; Waddle v. Downman, 12 M. & W. 562.

(*q*) Waddle v. Downman, 12 M. & W. 562.

(*r*) Hewitt v. Hewitt, 1 Q. B. 110.

bad on its face for not ascertaining the amount, if any, received by the bank in respect of the bills (*s*).

To pay share of expenses.

On a submission concerning all controversies relating to a certain voyage, an award directing that one party should pay his share of the expenses of the voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage, was held good, on the ground that those expenses and losses might be reduced to a certainty (*t*). This case, however, being cited in a recent argument, Alderson, B., seemed to question whether any action could be maintained on such an award (*u*).

To pay joint damages to plaintiff and stranger.

Where a third person became a party to an order of reference of a cause and all matters in difference, and the arbitrator was to settle all matters in difference between the plaintiff and defendant, and between the defendant and the third person, and the arbitrator did not specify the amount of damages payable by the defendant to the third party separately from the damages awarded to the plaintiff in the action, but awarded a joint sum to them, the court refused to enforce the award summarily (*x*); but an action being brought on the award, they held it valid (*y*).

Arbitrator need not ascertain amount of costs.

III. *Certainty as to costs awarded.*]—If a cause, either alone or with other matters, be referred, and the arbitrator in any terms direct one party to pay the whole or any proportion of the costs of the cause, as, for instance, if he order the defendant to pay all such monies as the plaintiff has expended about a certain action, or that the plaintiff shall pay five-eighths and the defendant three-eighths of the costs, the award is sufficiently certain, though it does not ascertain the amount. This exception, or apparent exception, to the rule requiring certainty, is grounded on the practice of the

(*s*) Marshall & Dresser, In re, 3 Q. B. 878.
(*t*) Beale v. Beale, Rolle. Ab. Arb. H. 14.
(*u*) Perry v. Mitchell, 2 D. & L. 457.
(*x*) Hawkins v. Benton, 2 D. & L. 465.
(*y*) Hawkins v. Benton, 15 L. J., Q. B. 139,

superior courts, in accordance with which the costs on such an award will be taxed as a matter of course by the officer of the court, whose peculiar duty it is to settle their amount, and who in so doing is considered as acting rather in a ministerial than judicial capacity (*z*).

Except costs in inferior courts.

This applies only to causes in the superior courts, for a direction to pay the costs of an action in an inferior court, without ascertaining the amount in the award, is void for the uncertainty (*a*). But if the arbitrator direct payment of the costs of a cause depending between the parties, it will be presumed, until the contrary be shown, that it is a cause in one of the superior courts (*b*). In an old case, a direction to pay all reasonable expenses which the plaintiff had sustained about the suit, was held too uncertain and void (*c*). So, likewise, an order to pay the charges spent at the making of the award (*d*). But in a subsequent case, where the award enjoined the defendant to pay the plaintiff all such costs, charges, and expenses, as the plaintiff had been put to in a certain cause then depending between the parties, the court held, that the direction respecting costs meant such costs as would be taxed and allowed by the officer of the court, and that therefore the award was good (*e*).

Giving rule for computing amount.

If the arbitrator give the rule for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain according to the general rule, "id certum est quod certum reddi potest (*f*). Thus where an award that one party should pay the other all such monies as he had expended about the prosecution of a suit was held sufficiently certain; the reason given was, that the amount would be ascertained by the attorney's bill (*g*). So, where the award was to pay the charges of a suit

(*z*) Pedley v. Goddard, 7 T. R. 73; Hanson v. Liversedge, 2 Vent. 242; Cargey v. Aitcheson, 2 B. & C. 170.

(*a*) Addison v. Gray, 2 Wils. 293; Winter v. Garlick, 1 Salk. 75.

(*b*) Fox v. Smith, 2 Wils. 267.

(*c*) Bargrave v. Atkins, 3 Lev. 413.

(*d*) Pinkny v. Bullock, cited 3 Lev. 413,

(*e*) Fox v. Smith, 2 Wils. 267.

(*f*) Higgins v. Willes, 3 M. & R. 382; Hopcraft v. Hickman, 2 S. & S. 130.

(*g*) Beale v. Beale, Cro. Car. 383.

depending between the plaintiff and defendant, and that the plaintiff should give the defendant a bill of the charges; this was held certain on the ground that the charges would be ascertained by the bill delivered (*h*). These cases are strictly in accordance with the present holding of the courts, if we may presume that they meant the attorney's bill after taxation, which reduces the amount, if disputed, to a certainty.

Amount made certain by reference to other document.

Though the award do not fix the amount, yet if it refer to any instrument, by reference to which the sum may be readily computed, it is good enough. Thus, where the arbitrators directed the defendant to pay to the plaintiff's attorney a certain amount, stated to be the amount of his bill delivered, which bill included charges for professional services for another as well as for the plaintiff, the award was considered by Parke, B., as sufficiently certain, although the amount of the plaintiff's share of that bill was unascertained by the award, since, as the sum awarded was stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill (*i*).

Costs of reference taxable on rule of court.

Where the reference is by agreement, and contains a stipulation that it may be made a rule of one of the superior courts, the amount of the costs of the reference may be taxed by the officer of the court; and therefore it is no objection that they are not settled by the arbitrators (*k*). Thus, an award under such a submission, directing the defendant to pay to the plaintiff's attorney his costs of attending the arbitration and of procuring the signatures of his clients and other parties to the enlargement of time, was held sufficiently certain, as the amount of these would be taxed by the master (*l*).

Presumption no dis-

IV. *Award when presumed certain.*]—The courts will

(*h*) Linfield v. Ferne, 3 Lev. 18.

(*i*) Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457.

(*k*) Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457.

(*l*) Thorp v. Cole, 2 C. M. & R. 367; S. C. 4 Dowl. 457.

strive to hold the award to be certain if possible. Therefore when an arbitrator ordered the plaintiff and defendant to pay the costs of some actions in certain proportions, and directed that the sums already expended by either party in respect of the actions (the award not specifying their amount) should be allowed as part of the proportion of the costs to be borne by each, the court said this was a certain and final award or otherwise, according as there were or were not disputes about the amount expended; but as it was not shown that there were any such disputes, the court would not presume there were any (*m*). The above decision was relied on in a case in which the award directed payment of a sum of money with interest to be computed from the date of the last settlement of accounts, (not stating the date of such settlement,) and the court sustained the award as not being necessarily uncertain, since they would not presume that the date of the settlement was in dispute (*n*). On the like principle, where the arbitrator ordered two persons to pay a debt in proportion to the shares which they held in a certain ship, without saying what they were, the court held it sufficiently certain, as it did not appear there was any dispute what their respective shares were (*o*).

Dispute about amount.

Interest "from date of last settlement."

In proportion to shares in ship.

Award de præmissis presumed certain.

According to the rule previously mentioned in the last section, where an award purports to be made "of and concerning the premises," it is held that these words have the effect of applying the general words of the award to the particular matters submitted (*p*). As, for instance, where the award purporting to be of and concerning the matters referred, ordered the defendant to pay to the plaintiff's attorney a certain sum as the amount of his bill delivered, without saying what the bill was for, the court sustained it as sufficiently certain, for they said they would intend that the bill was respecting the costs of certain notices of appeal, which was one of the matters submitted, the context showing

To pay amount of bill delivered.

(*m*) Cargey v. Aitcheson, 2 B. & C. 170.

(*n*) Plummer v. Lee, 2 M. & W. 495.

(*o*) Wohlenberg v. Lageman, 6 Taunt. 250.

(*p*) Rose v. Spark, 1 Saund. 324, n. (2); Al. 51; Thorp v. Cole, 4 Dowl. 457; S. C. 2 C. M & R. 367. See the last section, p. 260.

that the costs of the submission and of the reference, which were also submitted, were not included in the amount directed to be paid (*q*).

To pay distributive shares.

A submission reciting that the parties were relatives, and entitled to distributive shares of the effects of M., who died intestate; that the estate of M. consisted of debts, farm stock, cattle, and other effects; that differences of opinion had arisen respecting the value of the farm stock, cattle, and other effects, (not naming the debts,) agreed to refer all disputes to arbitration. The award which was made touching and concerning the matters in difference, found, that the defendant had monies, farm stock, and cattle, (not mentioning effects,) to a certain amount, and after other directions, directed the defendant to pay to the several parties their respective distributive shares of the residue of M.'s estate. The court held the award final and certain, though it did not ascertain the amount of the debts, or of the distributive shares, since as the award was made of and concerning the premises, the court would presume there was no dispute respecting them; they held, also, on the same principle, that although the arbitrator found nothing in respect of "*other effects*," but ascertained the monies, farm stock, and cattle, they would not presume there were any other effects than those enumerated (*r*).

Arbitrator awarding security must specify its nature.

v. *Certainty as to general directions.*]—The arbitrator must be equally precise in his directions to the parties to do any act as in those with respect to payment of money. Hence, if an arbitrator direct a party to give security for payment of a specified sum, without naming the kind of security, this is void for the uncertainty (*s*). Some doubt was thrown on the above position by Mansfield, C. J., in a case, where a sum was directed by the award to be paid, or

(*q*) Thorp v. Cole, 4 Dowl. 457; S. C. 2 C. M. & R. 367.

(*r*) Perry v. Mitchell, 2 D. & L. 452.

(*s*) Tipping v. Smith, 2 Stra. 1024; Thinne v. Rigby, Cro. Jac. 314. See Duport v. Wildgoose, 2 Bulst. 260.

to be secured to be paid, within a week from the date of the award, the court in that case holding that the party must within the time either pay the sum or give such security as was satisfactory to the party entitled to receive the money (*t*).

Must specify property awarded.

If the arbitrator order a party to give up a document described merely as "a certain obligation" (*u*), or to deliver up "three boxes and several books," without specifying the number or otherwise identifying the books, the direction is void (*x*).

We shall subsequently have occasion to notice the degree of specification and certainty requisite in the directions respecting alterations in the property of the parties or regulating their mode of carrying on their business, when the arbitrator is empowered to say what shall be done by the parties respecting the matters in difference (*y*).

Reasonable precision sufficient.

A reasonable degree of precision is all that is required of the arbitrator. Hence a direction to a mortgagee to reassign the mortgaged lands is sufficient, although it do not state for what period the reassignment is to be; for the court will intend that it is to be extended to the whole interest mortgaged (*z*).

To pull down nuisance.

A direction that a nuisance erected on the defendant's land should be pulled down, without saying by whom, has been held certain enough, on the ground that it will be intended that the defendant, who is the owner of the soil, is the party meant to pull it down (*a*).

Defendant or executors to release.

An award that the defendant or his executors or administrators should execute a release to the plaintiff, was held not to be void for uncertainty, and that it might be read as it were he *and* his executors and administrators were to do the act, and that the introduction of the personal representatives into the award was but cautionary, and would not vitiate it, since executors and administrators are by

(*t*) Simmonds v. Swaine, 1 Taunt. 548.

(*u*) Bedam v. Clerkson, 1 Ld. Raym. 123.

(*x*) Cockson v. Ogle, 1 Lutw. 550.

(*y*) See P. 2, ch. 8, s. 2, dd. 2, 3.

(*z*) Rosse v. Hodges, 1 Ld. Raym. 233.

(*a*) Armitt v. Breame, 2 Ld. Raym. 1076; S. C. 1 Salk. 76; Com. Dig. Arb. E. 11.

law bound by the submission of the testator, and the award creates a duty (*b*).

Not saying which of two to do act.

The arbitrator must specify the particular party who is to perform what the award directs. Therefore, where by the submission the arbitrator was to direct at what price A. or B. should purchase a certain piece of land, and the arbitrator, following the submission, directed that A. or B. should purchase it at a certain price, the court set aside the award for uncertainty, as the arbitrator, as well as ascertaining the price, ought to have decided which of the two was to purchase it (*c*).

SECTION VI.

THE AWARD MUST BE MUTUAL.

Something must be awarded for both parties.

In the old cases great stress is laid on the necessity of the award being mutual. It is said that awards must not be on one side only; that they are void unless something be arbitrated for the defendant's benefit as well as for the plaintiff's; that all controversies being between two parties, that which is awarded to be done by one must be an advantage to both, so as to end the controversy and discharge one as well as give satisfaction to the other; for if it do not it is manifestly unjust, and therefore whenever it appears to the court that notwithstanding the award the thing remains a duty as before, and is not discharged, that apparently is an award on one side, and consequently void (*a*).

(*b*) Freeman v. Barnard, 1 Ld. Raym. 247; Bac. Ab. Arb. E. 4; Dawney v. Vesey, 2 Vent. 249.

(*c*) Lawrence v. Hodgson, 1 Y. & J. 16.

(*a*) Bac. Ab. Arb. E. 3; Stains v. Wild, Cro. Jac. 352.

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Nothing more, however, is requisite to be done to form the mutuality of an award, than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made against the other for the cause submitted; and if one party alone be ordered to do something, and nothing else appear to the court, it shall be presumed that he alone is the wrong doer, and the award is good if it have the effect of releasing him from all future liability in respect of the wrong (*b*).

Compensation awarded must be a discharge of claim.

Old rule of construction.

Where, in the case of a trespass submitted, the arbitrator awarded that one party should pay the other a certain sum, this formerly was held to be a void award as being only on one side, on the ground that as the award did not say for what the money was to be paid, that the trespass was not discharged, and that the party ordered to pay received no advantage by the award: but it was said, if it had been awarded *de et super præmissis*, it would have been well enough; likewise if the award had been that he should pay the money *for the trespass* it had been good, for though only one party was to do the act, yet that the trespass by that award would have been discharged, and so both parties would have received an advantage (*c*). In another old case, where there were disputes between A. and B., and C. as attorney for B. submitted to an award respecting the differences between A. and B., and the arbitrator awarded that C. should pay A. a certain sum, that A. and C. should execute mutual releases, viz. that A. should sign a release to C. *to the use of C.*, and that C. should sign a release to A. to the use of A., the award was held bad as not being mutual, on the ground that nothing was awarded to B. or to B.'s benefit, but that it would have been good if the release to be made by A. to C. had been awarded to be for B.'s benefit, or if it had been to C. generally, for then it might have been intended to be for B.'s use, since the submission

Award de præmissis.

(*b*) Bac. Ab. Arb. E. 3.

(*c*) Nichols v. Grunnion, Hob. 49; Horton v. Benson, Freem. 204; Bac. Ab. Arb. E. 3; Roll. Ab. Arb. K. p. 253; Ayland v. Nicholls, Freem. 265; Ormelade v. Coke, Cro. Jac. 354; Veale v. Warner, 1 Saund. 327, n. (2).

was on B.'s behalf, but that as it was to C. for the use of C. such intendment could not be made (*d*).

An award that one shall pay so much for arrears of rent is mutual, since the word "*for*" implies that it is to be in satisfaction of the arrears, and so both parties are benefited (*e*). So an award to pay 5*s*. for having made the first breach in the law is plainly in satisfaction and discharge of the breach (*f*). So, also, an award for a debtor to pay a debt is mutual, as the payment is manifestly intended as a discharge of the debt (*g*). An award that all suits shall cease is mutual, since it has the effect of a release (*h*).

Sum awarded presumed in satisfaction.

Awards contrary to justice are equally objectionable now as ever, but less strictness and critical nicety is now used in construing these instruments than formerly. It is not now necessary, whatever it may have been, that an award should express that a sum awarded to be paid, or an act to be done in favor of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms; a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act (*i*). If the arbitrator direct the defendant to pay the plaintiff a sum without saying in respect of what it is to be paid, and the reference be of a cause only, the court will presume the payment is to be in respect of the plaintiff's claim in the cause (*k*).

Award manifestly unequal.

If trespass be for taking and detaining the plaintiff's beasts, and the arbitrator award merely that the owner shall have his beasts again, this is said in the old books to be void on the ground that it is against natural justice to give him his own again without satisfaction for the unjust taking and deten-

(*d*) Bacon v. Dubarry, 1 Ld. Raym. 246; Cayhill v. Fitzgerald, 1 Wils. 28, 58.

(*e*) Hopper v. Hackett, 1 Lev. 132.

(*f*) Hawkins v. Colclough, 1 Burr. 275.

(*g*) Baspoole v. Freeman, Cro. Jac. 285; S. C. 8 Rep. 97, b; Elliott v. Chevall, 1 Lutw. 541.

(*h*) Strangford v. Green. 2 Mod. 228; Harris v. Knipe, 1 Lev. 58; — v. Palmer, 12 Mod. 234.

(*i*) Thomlinson v. Arriskin, Com. Rep. 328; Cooper v. Hirst, 1 Lutw. 539; Veale v. Warner, 1 Saund. 327, n. (2).

(*k*) Hobson v. Stewart, 4 D. & L. 589.

tion (*l*). So if an award be that the owner shall have parcel of his own goods. But if the arbitrator award, whereas the parties are indebted to each other in the like sum, or have done each other a trespass, that they should release each other, this is mutual and good (*m*).

When infants and married women parties.

An objection was often made to awards affecting infants and married women on the ground of want of mutuality, for it was said that as these could not be forced to comply with the directions of the award, imposing burdens on them for the benefit of the other parties, it was not reasonable that the latter should be bound by the provisions affecting themselves, as they had no reciprocal benefit insured. Thus the Court of Chancery, in an old case, set aside an award which awarded a sum of money to an infant, and that a bond should be given by the guardian that the infant should at his full age convey certain lands, on the ground that it was unreasonable and not mutual, since the infant might die, or if he lived to full age, might refuse to convey (*n*). The principle has been sanctioned by the Court of Queen's Bench at no very distant period (*o*). But it may be doubted whether this objection will be entertained at the present day, for the rule now acted upon by the courts of law seems to be, that when a party has voluntarily and knowingly entered into a submission with married women or infants, and an award has been made, the court will refuse to set it aside on the ground that the married women or infants are not bound by it, as the party knew beforehand that they could not be bound, and therefore has all the consideration for his agreeing to the submission for which he stipulated, and if he did not mean to be satisfied with such effect as the award could have upon them, he ought never to have consented to the reference (*p*).

(*l*) Bac. Ab. Arb. E. 3; Rolle Ab. Arb. I. 3, p. 251.

(*m*) Bac. Ab. Arb. E. 3; Rolle Ab. Arb. I. 6, 7, p. 252.

(*n*) Cayendish v. —, 1 Cas. in Chanc. 279.

(*o*) Biddell v. Dowse, 6 B. & C. 255.

(*p*) Warner, In re, 2 D. & L. 148; Wrightson v. Bywater, 3 M. & W. 199; Jones v. Powell, 6 Dowl. 483.

The objection, however, is really an objection to the submission rather than to the award in most cases, and has been more fully considered in the previous part of this work concerning the parties to a submission, where it treats of the capacity of infants (*q*) and femes covert (*r*) to enter into a reference.

SECTION VII.

THE AWARD MUST BE POSSIBLE AND CONSISTENT.

Impossible award bad.

An award ought to be possible. If the arbitrator award a thing impossible ex naturâ rei, as to surrender an estate or to pay a sum of money at a day already past, the award will be void. But if he direct a thing to be done which cannot be done, but which is not in the nature of the act itself contradictory or repugnant, this may be a good award, as an award that one shall pay twenty pounds when he has not twenty pence, for no contradiction appears on the award itself (*a*).

If an act possible at first afterwards become impossible by the act of the party or of a stranger, the party is not freed from his obligation to perform the award (*b*).

If the award direct a party to do or to cause to be done an act which is presumably not within his power to effect, as to turn the river Thames, the direction will be void (*c*).

Unintelligible award.

An award must be an intelligible and consistent instru-

(*q*) See P. 1, ch. 2, s. 1, d. 4, p. 25.

(*r*) See P. 1, ch. 2, s. 1, d. 2, p. 22.

(*a*) Com. Dig. Arb. E. 12: Rolle Ab. Arb. E. p. 248; Rolle Ab. Arb. F; Bac. Ab. Arb. E. 4; Colwel v. Child, Cas. in Chanc. 86.

(*b*) Com. Dig, Arb. E. 12.

(*c*) Bac. Ab. Arb. E. 4; Co. Litt. 206.

ment (*d*). Great strictness was formerly held in construing awards. Thus an award to pay a sum "on the *said* first day of May," when no such day had been previously mentioned, was in an old case held void (*e*).

Contradictory award.

It is said in an old report that if there be any contradiction in the words of an award, so that one part cannot stand with the other, the first part shall stand and the second be rejected; yet if the latter be but an explanation of the former, then both parts shall stand (*f*).

Award when held inconsistent.

A more liberal interpretation of awards is now adopted than formerly, and the courts will strive, as far as they sensibly can, to put such a construction on them as will sustain them despite of any apparent inconsistency or repugnancy (*g*). Thus an award directing proceedings in the actions (several of which were referred) to cease, and also directing judgment to be entered up in one of them, (an ejectment,) was held not to be an inconsistent award, since by reading together the two directions, this construction was put on it by the court, that the award meant that the action of ejectment was to cease, unless the defendant failed to give up the premises by a certain day, in which event the lessors of the plaintiff were to enter up judgment and take out their execution (*h*).

Repugnant award set aside.

Where, however, the award is manifestly inconsistent and repugnant, the court will set it aside. On an action for a fraudulent representation of A.'s circumstances, the arbitrator found in his award that the defendant, in answer to the plaintiffs' inquiries respecting A.'s conduct, had not given a fair representation, but had omitted to state material facts. The arbitrator, however, distinctly acquitted the defendant of all fraud at the time of making the representation, yet thinking himself, as he stated, bound by adjudged cases

(*d*) Storke v. De Smeth, Willes. 66; Sherry v. Richardson, Pop. 15. See Doe d. Oxenden v. Cropper, 10 A. & E. 197.

(*e*) Com. Dig. Arb. E. 11. Markham v. Jennings, Rolle Ab. Arb. 254, 263.

(*f*) Perry v. Berry, 3 Bulst. 62.

(*g*) Templeman v. Reed, In re, 9 Dowl. 962; Stonehewer v. Farrar, 9 Jur. 203.

(*h*) Jones v. Powell, 6 Dowl. 483.

to decide that knowledge of the falsehood of the statement was fraud and deceit, he concluded by awarding in favour of the plaintiffs. The court held the arbitrator's law to be wrong, and set aside the award, Parke, J., saying, "The conclusion to which the arbitrator has come in this case is quite absurd. He says, I think he is innocent, and then awards against him (*i*).

Finding on inconsistent issues.

The necessity of finding on each issue has sometimes exposed the arbitrator to a charge of making an inconsistent award, but the two following cases will free him from any ungrounded apprehension on that score. In an action on an agreement, the defendant, by his first plea, denied the agreement, in the second the breach, in the third he admitted the agreement, but alleged it was rescinded before breach; in another plea that it was varied by consent. There were other pleas also. The arbitrator awarded a general verdict to be entered for the defendant. The court treating this as equivalent to a finding for the defendant on each issue, held that such a finding of inconsistent pleas in favor of the defendant did not render the award inconsistent, as possibly if the cause had been tried at Nisi Prius the circumstances of the case might have warranted such a finding (*k*).

In debt the pleas of nunquam indebitatus and payment may consistently both be found for the defendant, for if on a trial the plaintiff had failed in proof of his case, and the defendant proved a payment, the verdict would be entered for the defendant on both issues (*l*).

So where to an action of assumpsit on a retainer to project certain works, and to examine certain bills with care, the defendant pleaded, 1st, non assumpsit, 2nd, no retainer, 3rd, that the defendant did use care in projecting the works, 4th, that he did use care in examining the bills. The award found for the defendant on the 1st, 2nd, and 4th issues, and for the plaintiff on the 3rd. It was held that the award was

(*i*) Ames v. Milward, 8 Taunt. 637.

(*k*) Cooper v. Langdon, 9 M. & W. 60; S. C. 1 Dowl. N. S. 392.

(*l*) Maloney v. Stockley, 4 M. & G. 647.

good, and not repugnant, for that the finding on the 3rd and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them (*m*).

Where the plaintiff declared in case, alleging that he was entitled to the reversion in a close, that a person named Hearn had wrongfully and injuriously erected incumbrances thereon, and that defendant had wrongfully and injuriously kept and continued the incumbrances so wrongfully erected, and the defendant pleaded 1st, not guilty, 2nd, that Hearn did not erect the incumbrances on the close. An award directing a verdict for the plaintiff on the first plea, and for the defendant on the second, was held not to be inconsistent, since the first plea put in issue only the continuance of the nuisance by the defendant, and not the erection by Hearn (*n*).

Whether award must be reasonable.

It is said that an award ought to be reasonable, and that therefore an award that one party should serve the other for two years is void (*o*), or that one should release his right to the land in satisfaction of a trespass (*p*). The courts in general, though probably at the present day they would consider the award, in the first instance at least, to be void, as exceeding the authority given, decline examining into the reasonableness of the arbitrator's decision (*q*); and the courts of equity will enforce a specific performance of an award, notwithstanding it appears to be unreasonable in some respects.

Hence, although the question whether the vendor could make a good title to an estate was depending in a suit in the Exchequer, the Court of Chancery compelled one of the vendees, in pursuance of the award, to join the other in the sale of their equitable interest under the contract, although the court was of opinion that forcing the sale while the title was in dispute was unreasonable, and must depreciate the property (*r*).

(*m*) Duke of Beaufort v. Welch, 10 A. & E. 527.

(*n*) Grenfell v. Edgcome, 7 Q. B. 661.

(*o*) Com. Dig. Arb. E. 13; Rolle, Ab. Arb. B. 12, p. 243.

(*p*) Com. Dig. Arb. E. 13; Rolle, Ab. Arb. B. 13, p. 243.

(*q*) Waller v. King, 9 Mod. 63.

(*r*) Wood v. Griffith, 1 Swanst. 43.

SECTION VIII.

THE AWARD, HOW AFFECTED BY A MISTAKE OF THE ARBITRATOR.

1. *When the award is good on its face.*]—It is a point of some importance to ascertain how far, when the arbitrator has done his best to arrive at a right determination, and when there is nothing on the face of the award to show that the decision is wrong, the courts will listen to the suggestion that he has made a mistaken decision on questions of law or fact. On one occasion, when an arbitrator's decision was questioned on the ground of mistake, Lord Ellenborough, C. J., said that he feared it was impossible to lay down any general and certain rule to indicate in what cases the court would refuse to allow an award to be opened (*a*).

Effect of mistake, award good on its face.

For some time the common law courts made a distinction between a legal and a lay arbitrator, holding that when the merits both of law and fact were referred to a barrister, the court would not open the award for any alleged mistake unless something could be urged that amounted to a perverse misconstruction of the law, but they did not entertain the same confidence in the competency and probity of a non-legal arbitrator (*b*). This distinction, however, has been done away, and it has been settled by repeated decisions that the awards of legal and of lay arbitrators will be treated by the courts of law on exactly the same principles (*c*).

No distinction between lay and legal arbitrator.

(*a*) Chace v. Westmore, 13 East, 356.

(*b*) Chace v. Westmore, 13 East, 356; Sharman v. Bell, 5 M. & S. 504; Perriman v. Steggall, 9 Bing. 679; Cramp v. Symons, 1 Bing. 104; Williams v. Jones, 5 M. & R. 3.

(*c*) Marsh, In re, 16 L. J. Q. B. 330; Fuller v. Fenwick, 3 C. B. 705; S. C. 16 L. J. C. P. 79; Brown v. Croydon Canal Co. 9 A. & E. 522; Ashton v. Poynter, 3 Dowl. 201; Jupp v. Grayson, 3 Dowl. 199; Huntig v. Ralling, 8 Dowl. 879; See Wade v. Malpas, 2 Dowl. 638; Wilson v. King, 2 Dowl. 538, n. a.; S. C. 2 C. & M. 689.

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In the courts of equity no such distinction was ever recognised (*d*).

General rule, arbitrator's decision on law and fact final.

A close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake. Greater latitude was allowed formerly in reviewing the arbitrator's judgment than the courts would be disposed to permit at present. The general rule is, that as arbitrators are judges of the parties own choosing, they cannot object to their decision as an unreasonable judgment, or a judgment against law (*e*). They cannot impeach it as an erroneous judgment on the facts (*f*), or raise objections to it which involve questions arising altogether on the merits (*g*), whether the arbitrators have expressed their determination in an award, or merely in a certificate (*h*). No court of law or equity has any cognizance by way of appeal from the arbitrator's decision (*i*).

Claim by apothecary.

Thus where an action by a London apothecary for the amount of his bill was referred, and the arbitrator awarded a certain sum to the plaintiff, the court refused to permit the award to be impeached by affidavits offered to show that the arbitrator had allowed charges for attendances, which a London apothecary was not legally entitled to make, and held the award conclusive, there being nothing on the face of it to warrant the objection (*k*).

Decision on a demurrer.

In a recent case, an arbitrator having awarded that some pleas demurred to were good, and the declaration bad in substance, on a motion to set aside the award on the ground that the arbitrator had manifestly come to an erroneous decision respecting the validity of the pleas in law, the court refused

(*d*) Ching v. Ching, 6 Ves. 281; Steff v. Andrews, 2 Madd. 6.

(*e*) Fuller v. Fenwick, 3 C. B. 705; S. C. 16 L. J. C. P. 79; Marsh, In re, 16 L. J. Q. B. 330; Steff v. Andrews, 2 Madd. 6; Ives v. Medcalfe, 1 Atk. 63; Evans v. Pratt, 3 M. & G. 759.

(*f*) Morgan v. Mather, 2 Ves. 17; Dick v. Milligan, 2 Ves. 23.

(*g*) Winter v. Lethbridge, 13 Price, 533; Brown v. Brown, 1 Vern. 157; Lancaster v. Hemington, 4 A. & E. 345; Bouttilier v. Thick, 1 D. & R, 366; Hill v. Ball, 1 Dow. N. S. 164.

(*h*) Price v Price, 9 Dowl. 334.

(*i*) Goodman v. Sayers, 2 J. & W. 249.

(*k*) Gensham v. Germain, 11 Moore, 1.

to entertain the question, as the demurrers were among the things referred, and there was nothing in the reference empowering the parties to appeal to the court as a court of error upon the judgment given on the demurrers, and Wilde, C. J., said, "The court has no more authority to review the arbitrator's decision upon a point of law referred to him, than upon a point of fact. Whatever may have been formerly the understanding, it is enough to say that in modern times the decisions are distinct and uniform, that if parties choose to refer a matter of law to an arbitrator, his decision upon the matter is final" (*l*).

Liquidated damages as penalty.

On the same principle the court refused to grant a rule to set aside an award on a suggestion that the arbitrator had improperly treated as a penalty that which was by the express contract of the parties stipulated and ascertained damages (*m*).

Deciding claim for damages to be a debt.

So where in an action of debt referred, the arbitrator received evidence of a claim for damages for a breach of covenant in not delivering up some lands, notwithstanding the defendant objected that such claim did not constitute a debt recoverable in the action; and the award was made for an amount which evidently included a compensation in respect of this claim, the Court of Exchequer refused to grant a rule nisi to set aside the award, saying that the arbitrator was the judge of law and fact, and that as he had taken upon himself to decide whether this claim was a debt, or only a ground for damages, and he had decided it to be a debt, though possibly wrongly, the parties were concluded by his decision (*n*).

Decision contrary to evidence.

It cannot be alleged as a ground for setting aside an award, that the decision of the arbitrator is contrary to the evidence (*o*).

Exceptions on ground of mistake.

There are, however, very many cases which recognize an

(*l*) Emmerson v. Simpson, Doe d. Simpson v. Emmerson, Law Times, June 5, 1847.

(*m*) Fuller v. Fenwick, 3 C. B. 705.

(*n*) Faviel v. Eastern Counties Railway Comp. Ex. May 11, 1848.

(*o*) Bradshaw v. East and West India Docks and Birmingham Junction Railway Comp. Q. B., June 2, 1848.

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extensive head of exceptions on the ground of mistake, and which show that the courts, as a matter of course in many cases investigated the correctness of the principles on which the arbitrator founded his decision (*p*). Thus, where an attorney had brought an action on a bill not taxable, and it was referred to the clerk of assize, the Court of Exchequer held that it was competent for them to examine whether the arbitrator had adopted the right rule of taxation (*q*).

Reviewing taxation.

Pure question of law.

In Lord Eldon's time a somewhat refined distinction was made, for it was held that if a *pure* question of law were referred to an arbitrator, his decision on it, whether right or wrong, was final, as such a reference amounted in effect to an agreement by the parties to be bound by whatever he should say to be the law between them (*r*); yet on a *mixed* question of law and fact, which the arbitrator was bound to decide according to law, if intending to decide according to law he arrived at a wrong conclusion on the question of law, it was said the court would set the award aside, as it was not what he intended it to be, namely, a decision according to law (*s*).

Mixed question, law and fact.

It was laid down as law, in 1715, by Lord Chancellor Harcourt, that if it appeared that the arbitrator proceeded upon a *plain mistake*, either as to the law or in a matter of fact, the award would be set aside in like manner, as it would for an error appearing in the body of the award (*t*). This view of the law was sanctioned in numerous instances (*u*). But if the point of law were a doubtful one (*x*), or the error in fact could only be detected by unravelling matters of account (*y*), the Court of Chancery would give no

(*p*) Hardy v. Innes, 6 Moore, 574; Johnson v. Durant, 2 B. & Ad. 925.

(*q*) Broadhurst v. Darlington, 2 Dowl. 38.

(*r*) Ching v. Ching, 6 Ves. 281; Young v. Walter, 9 Ves. 364; Steff v. Andrews, 2 Madd. 6; Price v. Hollis, 1 M. & S. 105.

(*s*) Kent v. Elstob, 3 East, 17; Young v. Walter, 9 Ves. 364; Broadhurst v. Darlington, 2 Dowl. 38.

(*t*) Corneforth v. Geer, 2 Vern. 705.

(*u*) Anon. 3 Atk. 644; Richardson v. Nourse, 3 B. & Ald. 237.

(*x*) Ridout v. Pain, 3 Atk. 486; S. C. 1 Ves. 11.

(*y*) Brown v. Brown, 1 Vern. 157.

relief against the decision of the arbitrator. Yet in one instance Lord Chancellor Loughborough said he could not set aside the award on motion, supposing that it appeared that by a mistake of calculation the arbitrators had awarded a wrong sum, though he intimated a doubt whether in the case of such an evident mistake the court would enforce the award by attachment (*z*).

Award set aside for gross mistake.

The result of the numerous cases cited seems clearly to establish that though the courts could not interfere with the arbitrator's decision on the simple ground that he had judged erroneously, yet where there was a *clear gross mistake* affecting the result of the award, and that admitted or made out to the satisfaction of the arbitrators (as to which Lord Thurlow insisted on having their affidavits) the courts both of law and equity would, as a general rule not many years ago, have set aside the award (*a*).

Modern rule, award not impeachable for mistake.

Whether this rule will be followed in equity at the present day is perhaps uncertain, as the courts of law are now evidently inclined to hold that an award good on its face is not to be impeached on the ground of mistake alone (*b*).

Mistake amounting to misconduct.

In a recent case, A. claiming two sums to be due to him from B., the contention before the arbitrator was merely whether A. was entitled to both, or to only one of the sums, and the arbitrators, though meaning to give A. both sums, instead of adding them together, by mistake deducted the smaller from the greater, and instead of directing B. to pay A., awarded that the payment shall be made by A. to B. The Court of Common Pleas, labouring to find a reason for setting aside this incorrect and inequitable award, did not rest on the simple ground of mistake, but adverting to the circumstance that the award did not express the intention of the arbitrators, held that the mistake and negligence was so

(*z*) Morgan v. Mather, 2 Ves. Jr. 15.

(*a*) Knox v. Symmonds, 1 Ves. Jr. 369; Anderson v. Darcy, 18 Ves. 447; Delver v. Barnes, 1 Taunt. 48; Anon. 2 Chitt. 44; Payne v. Bailley, 7 Moore, 147; Ward v. Dean, 3 B. & Ad. 234; Potter v. Newman, 4 Dowl. 504; Rogers v. Dallimore, 6 Taunt, 111; Wade v. Huntley, 2 Tidd Pr. 841, 9th Ed; Hardy v. Ringrose, 1 H. & W. 185.

(*b*) Fuller v. Fenwick, 3 C. B. 705.

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gross as to amount, in the judicial sense of the term, to misconduct in the arbitrators, and so to justify the court in setting aside the award (*c*).

Exchequer not set aside award for mistake.

The Court of Exchequer have gone still further from the old rule above cited, and have avowedly adopted the principle that awards ought not to be set aside for mistakes, and express their dissatisfaction with the above decision *In re Hall & Hinds* (*d*); they have refused to be governed by it, not indeed in terms overruling it quite, but distinguishing it, and expressing a determination not to extend it further. It is better, say they, to adhere to the principle of not allowing awards to be set aside for mistakes, although possibly the rule may cause injustice to be done in particular instances, than by allowing mistakes to be a ground of impeaching the award, to open a door for inquiry into the merits in almost every case, for in nine cases out of ten it would be argued that there was some mistake (*e*). Therefore where the arbitrator made a mistake in omitting to take into account and give credit to the plaintiff for a large sum admitted by the defendant to be due to the plaintiff, and on the error being pointed out to him, the arbitrator acknowledged his mistake, and wished the matter to be referred back to him, that he might rectify it, though to this the defendant objected; the court refused to set aside the award, as the error did not appear on the face of the award, and (what distinguished the case from *Hall & Hinds, In re* (*f*) the arbitrator had not made any affidavit himself admitting the mistake (*g*).

Statements by arbitrator after award made.

II. *Effect of extrinsic statements by the arbitrator showing a mistake on his part.*]—After the award is made, the power of the arbitrator is at an end to alter the rights of the

(*c*) Hall v. Hinds, In re, 2 M. & G. 847; Ashton v. Pointer, 2 Dowl. 651.

(*d*) 2 M. & G. 847.

(*e*) Phillips v. Evans, 12 M. & W. 309.

(*f*) 2 M. & G. 847.

(*g*) Phillips v. Evans, 12 M. & W. 309; S. C. 13 L. J. Ex. 80.

parties as settled by it, except in so far as his statements made subsequently to it are admissible to affect it. These subsequent statements are to be distinguished from the statements made by the arbitrator during the reference. What the arbitrator says in the course of the proceedings may sometimes be given in evidence as part of the transactions themselves, for his statements may amount to acts, and are different from mere narrations of former acts or former processes of thought. In such case they are admissible in evidence when the rest of the proceedings in the reference can be inquired into. What we now proceed to consider is the effect of statements made subsequent to the award.

Whether admissible to affect award.

When an award is good on its face, the cases do not all agree in showing how far the courts will allow it to be impeached by extraneous evidence of statements of the arbitrator, showing that he has decided on reasons not tenable in law. As the courts of law are now inclined to hold that awards are not to be impeached for mistakes in law or fact not apparent on the award, they will, it is apprehended, at the present day in general reject such statements.

Statement of reasons delivered with award, received.

In the older cases, however, a different rule prevailed. On a reference respecting an injury to a ship at sea, where the arbitrator delivered a paper with his award, stating his reasons, the court treated this statement as embodied in the award, and consequently set the award aside, as it appeared that the arbitrator had acted on some marine law, and not on the law of England, in deciding on the right to damages (*h*).

Case stated with award.

In another instance, where the arbitrator having decided that the defendant was indebted to the plaintiff in a certain sum in the cause referred, delivered to the parties with his award a certificate, stating his wish that the defendant should not be precluded from taking the opinion of the Court of King's Bench on a point of law, and certifying certain facts which showed that the plaintiff and defendant were partners; the court, as a matter of course, and without any objection

(*h*) Kent v. Elstob, 3 East, 18; Sharman v. Bell, 5 M. & S. 504.

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made, took notice of the facts stated in the certificate, and set aside the award, holding the action not maintainable on the ground of the partnership (*i*).

Statement of reasons in paper annexed to award.

In a third case, where the arbitrator awarded a verdict for the defendant, and annexed to the award a certificate stating the facts, and that on his construction of the Building Act the plaintiff was not entitled to recover, the validity of the arbitrator's decision was fully discussed on a rule to set aside the award, which was ultimately discharged, the court agreeing with the arbitrator in his view of the law (*k*).

Letter of arbitrator.

The court on one occasion took into consideration, and set aside an award on a letter of the arbitrator, showing that the award extended to matters not within the submission (*l*).

Affidavit by arbitrator of mistake.

We have seen in the preceding pages that where a mistake was alleged as the ground of setting aside an award, the statements of the arbitrator were not only admitted, but his affidavit in some instances required (*m*).

Statement with a view to court's opinion.

Recently, under the following circumstances, the Court of Common Pleas received a statement from the arbitrator to impeach his decision. An action against executors for work done to their testator's house during his lifetime, was referred, with all matters in difference between the parties and the heir of the testator, who became a party to the reference. The plaintiff had done work to the house after the testator's death. The arbitrator directed the verdict for the plaintiff to stand for a specified amount, and awarded that the plaintiff had no further claim upon the defendants or the heir. The defendants having applied to the arbitrator, the latter, for the purpose of enabling the defendants to make an application to the court to review his decision, stated that the construction he had put upon the order of reference was, that if anything were due to the plaintiff either from the defendants or the heir, whether such debt were the subject

(*i*) Holmes v. Higgins, 1 B. & C. 74.

(*k*) Pratt v. Hillman, 4 B. & C. 269; see Toby v. Lovibond, 17 L. J., C. P. 201, per Wilde, C. J.

(*l*) The Ayre and Calder Navigation case, cited in Williams v. Jones, 5 M. & R. 3.

(*m*) See the previous division of this section.

of the action or not, the verdict in that action was to stand for the whole amount, and that he had acted on that principle in making his award. It was held by the court that though such statements, after the proceedings were finished, were not admissible in ordinary cases to impeach the award, yet that they were admissible here, as this case was an exception to the general rule, where the arbitrator, on being told that his judgment was to be reviewed, for the purpose of enabling the defendant to appeal, assigned the ground of his judgment, and showed that he had mistaken his powers (*n*).

Modern rule, statements of the arbitrator not receivable.

The general rule alluded to in the above remarks of the court is, it is apprehended, the rule at the present day. Older cases, however, are not wanting which show that the courts have declined to receive statements of the arbitrator to impugn the award.

Letter of arbitrator rejected.

Thus, when previous matters having been settled by an award, a second arbitrator, to whom other differences were referred, the day before he made his award for the defendant wrote a letter to the plaintiff's attorney stating that he felt himself bound to make an award in favor of the defendant, on the ground that the matter in dispute had arisen before the former reference, and that although he thought the first arbitrator mistaken, he considered himself concluded by his award; a motion having been made to set aside the award on the ground of the arbitrator being mistaken in supposing himself concluded by the first award, the court refused to entertain the question, the arbitrator not having raised it on the award itself, or on any paper annexed (*o*).

Letter of barrister arbitrator.

In a recent case, on a motion to set aside an award, where arbitrators, who were barristers, wrote letters explaining what were the matters in difference and the course the matters took on the reference, Pollock, C. B., seemed to think he might look upon the letters, since they were barristers, as good as affidavits, but Parke, B., doubted whether the court could notice them at all (*p*).

(*n*) Jones v. Corry, 5 Bing. N. C. 187.

(*o*) Williams v. Jones, 5 M. & R. 3.

(*p*) Keene & Atkinson, In re, Ex., Ap. 16, 1847.

Statement to explain award.

Where an award ordered that if certain sums of money were restored to the defendant they should pay them over to the plaintiff, the court refused to receive an affidavit of one of the arbitrators to explain the intention of this clause (*q*).

Letter of arbitrator to show his intention.

So, in a recent case, where the plaintiff was entitled to the costs of the cause, and the arbitrator directed each party to pay half the costs of the reference, and the master allowed the plaintiff only half the costs of the witnesses examined on his part, the Court of Exchequer, on a motion by the plaintiff to review the taxation and allow him the whole costs of the witnesses as costs in the cause and not in the reference, refused to take notice of a letter written by the arbitrator to the plaintiff's attorney, stating that his intention was that the plaintiff should have the costs of the witnesses attending before him, saying, that if the arbitrator had made a mistake they could not rectify it (*r*).

Paper delivered with award to limit verdict.

So also in the Court of Queen's Bench, where an ejectment brought to recover two closes was referred with an action of trespass, and the arbitrator ordered a general verdict for the plaintiff in the ejectment, the court held that they could not amend the postea in the ejectment by confining it to one of the two closes, although it appeared by a paper which the arbitrator delivered with his award, stating his reasons, that he considered the plaintiff was entitled to one close only, and though he awarded in defendant's favor on a plea in the action of trespass, justifying by reason of the defendant's title to the other close (*s*).

Inquiring grounds of damages.

III. *Inquiry by the court of the arbitrator's grounds of award.*]—Under peculiar circumstances, when the parties do not object, the court will inquire of the arbitrator upon what grounds he has made his award. Where the plaintiff's attorney obtained an order of Nisi Prius referring the cause

(*q*) Gordon v. Mitchell, 3 Moore, 241.

(*r*) Brown v. Nelson, 13 M. & W. 397.

(*s*) Doe d. Oxenden v. Cropper, 10 A. & E. 197.

only, and served it on the arbitrator, and the defendant's attorney also obtained from the associate an order not strictly a duplicate, since it referred the cause and all matters in difference, and the arbitrator, among other things, directed the defendant to pay the plaintiff a specified sum, the court ordered a reference to the associate to ascertain which of the two orders was in accordance with his minutes of the agreement made at the trial, and if the associate reported in favor of the defendant's order, then they directed a reference to the arbitrator, requesting him to state upon what ground he gave the damages (*t*).

As to what matters awarded on.

So in a recent case in the Queen's Bench, where the arbitrator was to award compensation to the prosecutor of an indictment for conspiracy, and the arbitrator stated in his award that he had not awarded anything in respect of damages to the prosecutor accruing between the time of filing the indictment and the reference, and it was proved that he had rejected evidence of damages accruing in the interval, the court directed an inquiry to be made of the arbitrator whether he had rejected evidence of damages arising after the indictment filed from the old conspiracy, or merely evidence of damages from a new conspiracy subsequent to the filing, being of opinion that under the submission the prosecutor was entitled to compensation beyond the time of filing the indictment, if the injury were the result of the original conspiracy (*u*).

Inquiry in open court.

On an application made to enter a suggestion to deprive a plaintiff of his costs under the London Court of Requests Act, the arbitrator having awarded less than £5, part of the plaintiff's demand being for rent, and actions for rent being excepted from the operation of the statute, the affidavits not showing whether the plaintiff had been allowed anything for rent, it was agreed to apply for information to the arbitrator, who happened to be in court, and the arbitrator stating that he

(*t*) Alder v. Savill, 5 Taunt. 453.

(*u*) R. v. Brewer, Q. B., June 11, 1845.

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had made an allowance for rent, the court discharged the rule (*x*).

Inquiry in equity.

In an old case in Chancery, on an inquiry whether the court ought to decree an award, the Master of the Rolls was on appeal held justified in ordering the arbitrators to certify to the court whether they had considered certain particulars which were in issue in the cause, but which the party objecting to the award asserted had not been considered (*y*).

Inquiry in equity not without consent.

In another instance in Chancery, where the court, for its own satisfaction, wished to inquire of the arbitrators respecting the course of business between the parties, it declined to make any order of reference to the arbitrators without consent, and the plaintiff refusing to consent, no order was made. In consequence, however, of what fell from the court the arbitrators made a certificate, in which, instead of giving a short answer to the points on which the court wanted information, they went into a long history of their conduct, on which account the court refused to read the certificate (*z*).

Award stating grounds of decision, whether court will review them.

IV. *When the award sets forth the grounds of decision.*] —In other sections of this chapter it is shown that the courts will invariably take notice of errors on the face of the award, if they be imperfections in the mode of deciding (*a*), or unwarranted assumptions of authority by the arbitrator (*b*); but when the decision is one that complies with all the rules previously laid down for the framing a valid award, and is confined strictly to matters within the arbitrator's jurisdiction, it is not quite clear how far the courts will annul the decision when it is manifest from statements on the face of the award that the arbitrator has mistaken the law.

(*x*) Holden v. Newman, 13 East, 160.

(*y*) Squib v. Bolton, Cas. in Chanc. 186.

(*z*) Morgan v. Mather, 2 Ves. Jr. 15. See Dobson v. Groves, 6 Q. B. 637, 643.

(*a*) Ss. 3, 4, 5, 6, 7.

(*b*) S. 9. post. p. 136.

Until recently, the courts seem generally to have considered the statements and reasons assigned in the award as the ground of decision, and have set aside the award when the arbitrator has proceeded on principles contrary to law (*c*). Possibly, however, in many cases, where the report does not give the submission, the arbitrator may have been authorized to state a case for the decision of the court.

Wrong view of the law.

An action on the case for fraudulent representation of the circumstances of a particular individual was referred. The arbitrator stated on the face of the award that the defendant had knowingly made a false representation respecting the party's credit, but that he acquitted the defendant of all fraudulent intention. The arbitrator, however, added, that he felt himself compelled by adjudged cases to decide that the knowledge of the falsehood of this assertion was in itself fraud and deceit, and consequently he awarded in favor of the plaintiff. The court, holding the arbitrator's view of the law to be wrong, set aside the award on the ground that he had on the face of it acquitted the defendant of all fraud (*d*).

Wrong construction of statute.

In another case, where the arbitrators stated facts specially, and awarded for the plaintiff on the ground that the defendant's acts were not done in pursuance of an Act of Parliament, the court, differing from the arbitrators in their view of the law on the facts set out, held the defendants protected as acting in pursuance of the statute, and set aside the award (*e*). According to the same principle, the court set aside an award where a paper delivered by the arbitrator with the award, and treated as part of the award, contained a statement of the reasons for the decision which showed that the arbitrator had acted on an incorrect notion of the law (*f*).

New rule,

The Court of Queen's Bench, however, at the present day,

(*c*) Pratt v. Hillman, 4 B. & C. 269; Sharman v. Bell, 5 M. & S. 504; Williams v. Jones, 5 M. & R. 3; Wood v. Hotham, 5 M. & W. 674.

(*d*) Ames v. Milward, 8 Taunt. 637.

(*e*) Gaby v. Wilts Canal Company, 3 M. & S. 580.

(*f*) Kent v. Elstob, 3 East, 18.

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will not, it seems, consider the validity of the legal principles on which the arbitrator has proceeded, unless he be authorized to submit a point of law for their review. For where arbitrators, after assessing the amount of damages, without any power given them by the submission, stated expressly for the determination of the court, in case it should please to entertain the question, the construction they had put upon a statute, upon which their assessment proceeded, the court held all, after the positive finding of damages, might be rejected as surplusage (*g*).

Court not examine reasons unless arbitrator empowered to raise point.

Doubtful if Common Pleas assent to the rule.

But it must be noticed, that in a recent case in the Common Pleas, Wilde, C. J., refusing a rule to set aside or refer back an award good on its face on the ground of an alleged mistake in law, observed, "Unless upon the face of the award we can distinctly collect what the arbitrator intended to decide, and we can see that he has decided wrongly, the court will not interfere (*h*). In another report of the same case the statement is a little varied, and the learned judge is reported to have laid down the condition as to the non-interference of the courts; thus, "Unless they could distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to law," they would not interpose (*i*).

In another instance, also, Wilde, C. J., said, "It is also clear that if there be matters of law which the arbitrator thinks are proper to be raised as questions of law for the court to determine, the court will entertain them; and to this the parties to the reference are presumed to agree" (*k*). It is to be observed, that in neither of the two cases cited was it necessary for the decision of the question before the court to lay down the above propositions.

Court not examine sufficiency of facts stated.

If the arbitrator, not being empowered to state facts for the purpose of raising any point of law for the decision of the court, set out in his award a statement of facts on which he

(*g*) Wright & Cromford Canal Company, In re, 1 Q. B. 98.

(*h*) Fuller v. Fenwick, 16 L. J., C. P. 79.

(*i*) Fuller v. Fenwick, 3 C. B. 705.

(*k*) Toby v. Lovibond, 12 Jur. 436; S. C. 17 L. J., C. P. 201.

professes to ground his decision, and those facts apparently do not warrant the conclusion at which he ultimately arrives, the court will in general decline to draw any conclusion themselves from them so as to impeach the award, and will support it as valid, provided it contain a positive definite adjudication on the matters in difference (*l*); and according to one case, provided also there were any evidence which a judge would have been justified in leaving to a jury (*m*).

Stating insufficient reasons.

Thus, where an action of trespass, to which the defendant had pleaded not guilty and a justification, was referred, and the arbitrator awarded, that as the defendant had not proved his plea, the verdict for the plaintiff ought to stand, and then stated a number of reasons for his opinion, which could not be considered as satisfactory; the court held the adjudication sufficient, and declined to consider the sufficiency of the reasons assigned (*n*).

Court not presume facts stated, only grounds.

In many cases the court will not presume that there were no other facts to warrant the award than those recited in it; the arbitrator may have a particular reason for stating certain facts, as for instance, to clear the character of a party from an imputation (*o*).

Stating facts without positive finding bad.

If, without special authority, the arbitrator merely find certain facts, and instead of finally adjudicating on the points in difference, leave the law to be applied by the court, the award will not be final. For instance, where, after stating the facts, the award proceeds, "If on these facts the court be of opinion that the plaintiff is entitled, then I award in favor of the plaintiff, but if the court think the defendant entitled, then I award in favor of the defendant;" such an hypothetical finding is insufficient (*p*). But if the arbitrator himself first make a positive adjudication respecting both facts and law, and then submitting a

(*l*) Archer v. Owen, 9 Dowl. 341.

(*m*) Barrett v. Wilson, 1 C. M. & R. 586; S. C. 3 Dowl. 220.

(*n*) Archer v. Owen, 9 Dowl. 341.

(*o*) Lancaster v. Hemington, 4 A. & E. 345; Teale v. Younge, M'Lel. & Y. 497.

(*p*) Wright & Cromford Canal Company, In re, 1 Q. B. 98; Anderson v. Fuller, 4 M. & W. 470.

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Where positive finding, statement of facts and reasons rejected.

question to the consideration of the court, add, if the court shall be of opinion that some suggested decision different from that at which he has arrived is the correct one, then he awards accordingly, the award will be final; for the court will not entertain the question, but will look only to the positive finding, and reject that part of the award in which reference is made to the court (*q*).

Special power requisite to raise points of law.

v. *Duty of the arbitrator when empowered to raise a point of law.*]—The submission often contains a provision directing or empowering the arbitrator to state points of law on the face of his award, for the purpose of obtaining the decision of the court upon them. In one case the court is reported to have said that even without such a clause the arbitrator has power to state a case for the opinion of the court (*r*), but it is apprehended that it is very doubtful now whether the court would take any notice of points raised for their consideration without the parties had by the submission previously agreed that they should decide upon them (*s*).

When compulsory to state case.

If the terms of the submission be compulsory that the arbitrator shall state a case at the request of the parties, it is the duty of the arbitrator to set forth fully in his award all such facts as will raise all the questions of law on which the decision of the courts is desired, and it seems that the award will generally be bad if he fail to do so (*t*). To prevent any mistake, it is advisable for him to call upon the parties to furnish him with a written statement of the questions of law they require to be raised. But if by the terms of the order of reference the arbitrator "be *at liberty* to raise any point for the opinion of the court at the request of either of the parties," he is not bound to do so unless he

When arbitrator at liberty.

(*q*) Barton v. Ransom, 3 M. & W. 322; Wright v. Cromford Canal Company, 1 Q. B. 98; Bradbee v. Christ's Hospital, 4 M. & G. 757; Scott v. Van Sandau, 6 Q. B. 237.

(*r*) Wood v. Hotham, 5 M. & W. 674.

(*s*) Wright & Cromford Canal Company, In re, 1 Q. B. 98; Bradbee v. Christ's Hospital, 4 M. & G. 714.

(*t*) Bradbee v. Christ's Hospital, 4 M. & G. 714.

think fit: the clause is an enabling not a compulsory one (*u*).

Power as to evidence and points reserved as a judge at Nisi Prius.

Where the arbitrator has the same power as a judge at Nisi Prius to decide as to the admissibility of evidence, and to reserve points of law for the decision of the court, he takes a correct view of his duty if he refuse to pledge himself beforehand to raise on the face of his award all the objections a party may bring forward, retaining to himself a discretion on the subject (*x*). However, as the meaning of the above provision in the submission is, that the award is to be made subject to the exception as to evidence, and the points reserved, according to the analogy of Nisi Prius those points which the award reserves the court will decide; and if any objections to the evidence be omitted which the party may think ought to have appeared, he will be free to avail himself of the stipulation in the order of reference, and call upon the court, if it sustain the objection, to set aside the verdict in consequence (*y*).

Arbitrator should set forth facts not evidence.

When the arbitrator is at liberty, if he shall think fit, to report specially to the court, he does not duly exercise his power if he set out in his award a long statement of the evidence, leaving the court to draw the inferences of fact. It is his duty to draw the necesssary inferences from the facts (*z*).

Arbitrator should find positively.

It being a question in a cause whether the defendant, a pawnbroker, had made proper inquiries of a person coming to pledge goods, an arbitrator, to whom the cause was referred to state a case, stated that he was unable to say whether or not the defendant had made the proper inquiries; the court compelled the defendant to agree to another reference to the arbitrator, in order that the latter should find positively in the affirmative or in the negative (*a*).

(*u*) Wood v. Hotham, 5 M. & W. 674. See Jay v. Byles, 3 M. & Sc. 86, where the provision, the arbitrator "shall state points of law," seems to have been treated as enabling, not compulsory.

(*x*) Scott v. Van Sandau, 1 Q. B. 102.

(*y*) Scott v. Van Sandau, 1 Q. B. 102.

(*z*) Jephson v. Howkins, 2 M. & G. 366.

(*a*) Ferguson v. Norman, 4 Bing. N C. 52.

Stating abstract legal propositions.

In one case, where there was a provision "that the arbitrator shall state on his award any point or points of law raised by either party," the arbitrator in his award set forth in terms certain abstract legal propositions contended for by the defendant as defeating the plaintiff's right to recover, and certified that he had overruled them, as upon consideration of the evidence it appeared to him none of the objections ought to prevail. The court refused to refer the award back to the arbitrator to set forth the facts on which the questions of law arose, or to set the award aside, the arbitrator having decided rightly the broad propositions of law set out in his award (*b*).

Point intended to be left open for the court.

If it clearly appear from reading an award that an arbitrator who was empowered to raise points intended to leave a particular question of law open, the court will consider it, although in terms the arbitrator may in one part of his award have determined it (*c*).

Providing for the events of the court's decision.

How far an arbitrator, when empowered to raise questions for the court, is bound to make an adjudication himself on the points he submits for the opinion of the court, does not seem quite clear. It is, however, apprehended that it is unnecessary for him to express any opinion of his own, and that on a reference at Nisi Prius it is sufficient for him, after stating the facts of the case in his award, and either leaving it generally for the court to decide on them whether the action or defence can be maintained, or setting forth special questions only for their determination, to conclude by awarding that if the court shall be of opinion, on the facts stated or the questions raised, as the case may be, that the plaintiff is entitled to recover, then that the verdict which has been taken for the plaintiff do stand, with such damages as the arbitrator may think proper; but if the court shall be of opinion that the action is not maintainable, or that such and such questions raised ought to be decided in the defendant's favor, then that the verdict already entered for the plaintiff be set aside, and instead thereof a verdict be

(*b*) Jay v. Byles, 3 M. & Sc. 86. (*c*) Sherry v. Oke, 3 Dowl. 349.

entered for the defendant (*d*). This form of awarding respecting the action is merely given to illustrate the principle involved, and cannot in itself be applicable to the infinite variety of cases that may occur; for of course the arbitrator ought to provide for the effect of every possible decision of the court on the points submitted, so far as they may affect the various issues in the cause, the amount of damages recoverable, or other rights and liabilities of the parties regulated by the provisions of the award.

Raising point as to validity of custom and judgment non obstante veredicto.

In one instance, where an arbitrator was empowered to direct that a nonsuit or a verdict should be entered for the plaintiff or the defendant as he should think proper, and was at the request of either party to state any point of law upon the face of his award for the opinion of the court, it was held not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up, but that having by his award disposed of all the issues joined on the record, and assessed damages separately in respect of each grievance in the declaration, and having referred to the court, at the request of the defendant, by a sufficient statement of facts, the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, and at the request of the plaintiff, the question as to the validity of a custom set out in a plea, and the allegations contained in it, and as to the plaintiff's right to judgment non obstante veredicto on the same plea, should the issue thereon be found for the defendant, he had properly discharged his duty, and was not bound to have definitely determined as to the validity of the custom (*e*).

Deciding case first, then raising point for the court.

Sometimes the arbitrator first finds the various issues in the cause referred himself, subject to the opinion of the court, and then, after setting forth the whole facts, states particular questions on which he requires the decision of

(*d*) Richards v. Easto, 15 M. & W. 244; The Grocers' Company v. Donne, 3 Bing. N. C. 34.

(*e*) Bradbee v. Christ's Hospital, 4 M. & G. 714.

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the court, and concludes with the awarding, if the court shall decide a particular question one way, then he awards in one way; if in another, then he awards in another (*f*).

Arbitrator should provide for the event of court differing from him.

It is advisable for the arbitrator, though he determine the matter himself to make a provision for the event of the court differing from him in opinion, for if the arbitrator find for the plaintiff in the action referred, and then state facts for the opinion of the court which show that the plaintiff ought to have been nonsuited, the court cannot direct a nonsuit to be entered, but can only set the award aside (*g*), and thus all the litigation becomes fruitless; whereas, if he direct that in case the court differs from him the verdict shall be entered for the defendant, the decision of the court in favor of the latter will, according to many cases, entitle him to have the verdict entered for him (*h*).

Awarding hypothetically.

Doubts, however, as to the validity and utility of an hypothetical finding were in one case thrown out. The arbitrator had found positively for the complainant, and then stating facts, awarded that if the court should be of such an opinion, then the sum to be paid should be increased to such another sum, and if of another opinion, that it should be reduced so much: the court agreeing with the arbitrator, supported the award; but assuming the points of law to have been properly raised, Lord Denman, C. J., expressed a doubt whether, if the court had disagreed with the arbitrator, the hypothetical finding and assessment could have stood, or whether the award must not have been set aside altogether (*i*). There does not, however, seem to be any case in which the court, assenting to one of the views suggested by the arbitrator, have ever refused to enforce the hypothetical finding dependent on it, and instead thereof set the award aside.

(*f*) Waller v. Lacy, 1 M. & G. 54; Arnold v. the Mayor of Poole, 4 M. & G. 860.

(*g*) Peters v. Anderson, 1 Marsh. 238.

(*h*) France v. White, 8 Dowl. 53; Waller v. Lacy, 1 M. & G. 54; Arnold v. Mayor of Poole, 4 M. & G. 860; Webb, In re, 8 Taunt. 443; Bradbee v. Christ's Hospital, 4 M. & G. 714.

(*i*) Wright v. Cromford Canal Company, 1 Q. B. 98.

Hypothetical finding good.

On the contrary, an hypothetical decision providing for the different views the court may take has, as will be seen from the cases previously cited on this subject, been either assumed or decided to be sufficiently final and certain, and acted on by the courts.

In the following case, where the submission provided that the arbitrator should have the same power as a judge at Nisi Prius to decide as to the admissibility of evidence and to reserve points of law for the decision of the court, and the arbitrator, after making a special statement of facts affecting the admissibility of certain depositions in evidence, awarded that the verdict should be reduced to £1,356, if the court should be of opinion that the depositions of A. and B. were admissible, to £1,165 if the court should think the depositions of A. only admissible, and to £579 if the court should think neither of the depositions admissible; though the observations of Lord Denman, in *Wright* v. *Cromford Canal Company* (*k*), were cited, the court held the award to be final, and likened it to the finding of a jury in a special verdict, and they observed that there was a positive finding for the plaintiff for the smallest of the three sums, and that it was only necessary for him to come to the court in case he wanted a larger amount. The court, however, on motion, gave the plaintiff the benefit of one of the hypothetical findings, and directed the verdict to stand for £1,165 (*l*).

(*k*) 1 Q. B. 98. 237.
(*l*) Scott v. Van Sandau, 6 Q. B.

SECTION IX.

THE AWARD THOUGH BAD IN PART, WHEN GOOD FOR THE REST.

PART II. CH. V. S. 9.

Award bad in part may be good if all matters well decided.

1. *When the bad part of the award is separable.*]—Though before the time of King James the First, according to Holt, C. J., an award void in part was considered void altogether (*a*), it is now quite clear that an award bad in part may often be good for the rest. If, notwithstanding some portion of the award is clearly void, the remaining part contain a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected (*b*).

When bad part separable.

The bad portion, however, must be clearly separable in its nature in order that the award may be good for the residue (*c*). When it is so divisible, the faulty direction will alone be set aside.

Award bad in part for excess.

This position is illustrated by the numerous cases in which an arbitrator has exceeded his authority by directing something to be done which he had no power to order, and therefore made an award clearly invalid as to the unauthorized direction.

Excess as to costs.

Thus, where the plaintiff seeks to enforce an award which orders the defendant to pay him a specified sum, and also the amount of the costs of an action between them, or of the reference, or to pay them at a particular time, and the arbitrator has no such power over the costs as he assumes, and consequently the direction as to costs is void; yet if the latter be clearly separable from the other portion of the award, the court will compel the defendant

(*a*) Furlong v. Thornigold, 12 Mod. 533.

(*b*) Stone v. Phillipps, 4 Bing. N. C. 37.

(*c*) Tandy v. Tandy, 9 Dowl. 1044; Auriol v. Smith, 1 Turn. & R. 121; Watkins v. Phillpotts, M'Lel. & Y. 393.

to perform the rest of the award, and to pay the sum awarded (*d*).

Excess as to entry of verdict.

If an arbitrator determine the cause referred by finding the issues properly, and then without authority direct a verdict to be entered, the court will not set aside the good part of the award, since the unauthorised direction as to the verdict is separable, and may be rejected alone (*e*).

Excess as to entry of judgment.

An arbitrator who had no power to direct a judgment to be entered, awarded on an action of ejectment in the following terms. "I award, order, and determine, that judgment for the plaintiff be entered in the said action, with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land,"—describing it. The court, setting aside the direction as to the entering of judgment, refused to set aside the award wholly, being of opinion that if all mention of the judgment were struck out, there was a sufficient finding of the cause in the plaintiff's favor, and that it might be struck out without altering the intention of the award as to the matters within the arbitrator's jurisdiction (*f*).

Excess as to a stranger.

Where the award orders the defendant to pay one sum to the plaintiff and another to a stranger, or to execute a lease for life of certain lands to the plaintiff, with remainder in fee to a stranger, the defendant has been compelled to give the plaintiff what the award directs, though he is not bound to obey the arbitrator as far as regards the stranger (*g*). So likewise, if one party, a banker, be ordered to pay the other a sum out of a stranger's money in his hands, though clearly the arbitrator has no right to meddle with funds of third parties, the party to whom the payment is ordered to be

(*d*) Candler v. Fuller, Willes, 62; Aitcheson v. Cargey, 2 Bing. 199; Whitehead v. Firth, 12 East, 166; Strutt v. Rogers, 7 Taunt. 212; Boodle v. Davies, 3 A. & E. 200; Barker v. Tibson, 2 W. Bl. 953; Cockburn v. Newton, 9 Dowl. 676; Marder v. Cox, Cowp. 127; Firth v. Robinson, 1 B. & C. 277; Rees v. Waters, 16 M. & W. 263.

(*e*) Howett v. Clements, 1 C. B. 128; Hawkyard v. Stocks, 2 D. & L. 936.

(*f*) Doe d. Body v. Cox, 4 D. & L. 75.

(*g*) Bretton v. Prat, Cro. Eliz. 758; Bac. Ab. Arb. E. 1; Com. Dig. Arb. E. 14.

made may sustain the award as to other parts, if they be not affected by the direction as to stranger's money (*h*).

Excess as to releases.

If the arbitrator order the parties to execute mutual releases of all matters in difference, when the submission is confined to particular differences; or of all differences up to the date of the award, the arbitrator having power only up to the date of the submission; though in one case it was condered that a release being an entire instrument could not be void in part and good in part (*i*), the courts have often held that this direction is good to compel the parties to execute releases as to the particular matters, and up to the date of the submission, but void as to the matters not referred, and as to differences arising subsequent to the reference (*k*).

Excess as to suits.

So if on a submission respecting suits for tithes, the award order all suits between the parties to cease, there being suits for other things depending between the parties, the award is void as to the suits for the other things, and good as to the suits for tithes (*l*).

In like manner when the costs of the action are to abide the event, if the arbitrator, after finding on all the issues, direct a stet processus, the direction is void, as being an excess of authority, but being clearly separable, may be rejected without invalidating the rest of the award (*m*).

Excess as to directions what shall be done.

When the main question was which of two parties jointly interested in a ship should pay the expenses incurred on account of it after a certain date, and the arbitrator directed one of them to pay them, and to give the other a bond of indemnity against the payment of them, the majority of the court held the award good in toto: and Maule, J., though he doubted as to the award of the bond, was yet of opinion that

(*h*) Ingram v. Milnes, 8 East, 444.

(*i*) Vanlore v. Tribb, Rolle, Ab. Arb. N. 1, p. 258; 1 S. C. Rolle, Rep. 437 contrà; Pickering v. Watson, 2 W. Bl. 1118 contrà.

(*k*) Doe d. Williams v. Richardson, 8 Taunt. 697; Lee v. Elkins, 12 Mod. 585; Squire v. Grevett, 2 Ld. Raym. 961; Hill v. Thorn, 2 Mod. 309: Abrahat v. Brandon, 10 Mod. 201; Anon, 12 Mod. 8; Hooper v. Pierce, 12 Mod. 116.

(*l*) Webb v. Ingram, Cro. Jac. 663.

(*m*) Ward v. Hall, 9 Dowl. 610.

even if that were invalid, the award would only be bad pro tanto (*n*).

Future repairs.

An arbitrator appointed to decide upon the method of draining certain lands, after ordering certain works, exceeded his authority by giving a direction respecting future repairs. The House of Lords held the award bad only for the excess, as by striking out that direction the rest of the award was not affected (*o*). So where the arbitrator, who had power to regulate the use of a stream of water flowing through certain ponds, after directing how it was to be used, added a provision concerning the flow of the stream in case the ponds should be filled up at any time, the court, inclining to think this hypothetical finding an excess of the arbitrator's authority, were clearly of opinion that it did not vitiate the other directions in the award (*p*).

Hypothetical provision.

Excess as to reserving authority.

An award to pay a certain amount for goods supplied contained a proviso that if he who was to pay could, before a certain day, disprove the receipt of the goods, or give better proof of the payment of some sums of money, he should be relieved from payment of all such portions of the amount as should be so disproved or proved respectively. In one report of this case it is stated that the court held the reservation void, but the award good, as an award to pay the whole amount, and that the provision respecting the proof of payment was simply void as surplusage, for that the authority of the arbitrator was at an end the moment the award was made (*q*). In another report of the same case it was said the court took time to consider whether the reservation should frustrate the whole award, or whether the award should stand, and only the reservation be void (*r*).

An arbitrator, to whom an action respecting a watercourse and all matters in difference was referred, directed a verdict for the plaintiff, and ordered certain works to be

(*n*) Brown v. Watson, 6 Bing. N. C. 118.

(*o*) Johnston v. Cheape, 5 Dow. 247.

(*p*) Winter v. Lethbridge, 13 Price, 533.

(*q*) Beckwith v. Warley, Rolle. Ab. Arb. H. 9, p. 250.

(*r*) Warley v. Beckwith, Hob. 218.

done by the defendant. He then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceedings were taken by the plaintiff within two months after the work was done, the award then made should be final, and he enlarged the time for making his further and final award, if requested, to six months. The court held the latter part of the award bad, as it assumed to reserve a power over future differences, which was not authorized, but that the former part was good, as being a final decision of all the matters in difference at the time of the submission, and that the clause as to making a further and final award was to be considered as having reference to prospective differences only, and so not to affect the valid part of the instrument (*s*).

Who may complain award wholly bad for excess.

It may be observed with regard to the class of cases above cited, that although the courts have refused to allow the party who is ordered to do certain acts to object that the award is wholly void because the arbitrator has awarded something within his power, and also something beyond, yet it by no means follows that in many of them the award would not have been set aside in toto, had the complaint come from the other party that he could not, by reason of the badness of the award in one particular, receive all the benefit the arbitrator contemplated to give him (*t*).

Illegal matter.

Where an arbitrator directed payment to the defendant of a sum of money, as the balance of the general account, and also of another sum stated on the face of the award to be due to the defendant on account of illegal insurance partnership transactions between him and the plaintiff, the award was held bad as to the latter sum only (*u*). But where some farmers, conceiving themselves overrated to the poor-

Poor rate and costs.

(*s*) Manser v. Heaver, 3 B. & Ad. 295.

(*t*) Taylor v. Shuttleworth, 8 Dowl. 281.

(*u*) Aubert v. Maze, 2 B. & P. 371.

rate in proportion to other parishioners, entered into a submission with the churchwardens and overseers, by which the validity of the rate, the costs of preparing for an appeal to the sessions respecting it, and the costs of the reference, were left to the arbitrators, who awarded on each matter; the majority of the Court of Exchequer held, that as the chief subject-matter, namely, the rate, was one which could not lawfully be referred to arbitration, the award respecting it was void, and being void as to the principal matter, it was void as to the costs also (*x*).

Excess a condition precedent.

Although the doing an act such as the executing mutual releases be made conditional upon payment of certain sums and certain costs, it has been held, that although the direction as to costs be void, it can be so far separated in some cases as to permit of the award being sustained for the residue (*y*).

Where the costs were in effect to abide the event, and the arbitrator, after directing the defendant to pay the plaintiff a certain sum for the debt due, and another sum stated in the award to be the amount of the plaintiff's costs, had ordered that after payment of the several sums each party should execute a release to the other if required; it was objected that as the arbitrator had exceeded his authority in ascertaining the amount of the costs, the direction as to that payment was invalid, and that as the defendant's obtaining a release was made conditional on payment of that sum among others, so that the defendant could not obtain the release without paying a sum the arbitrator had no right to impose, the whole award was void. But Coleridge, J., agreeing that the arbitrator had no authority to tax the amount of the costs, yet feeling himself bound by the decision of *Aitcheson* v. *Cargey* (*z*), sustained the award, holding the bad part separable, and that the defendant would probably entitle himself to the release on payment of the costs regularly taxed, and the amount of the debt (*a*).

(*x*) Thorp v. Cole, 4 Dowl. 457.

(*y*) Aitcheson v. Cargey, 2 Bing. 199.

(*z*) 2 Bing. 199.

(*a*) Kendrick v. Davies, 5 Dowl. 693.

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Though the award be deficient as to a matter within the submission, if it be separable the rest of the award may often be supported. Thus, if the arbitrator having power over the costs, order the defendant to pay the plaintiff a sum of money for debt or damages, and also the costs of the action, but the direction as to the costs be bad for uncertainty, as, for instance, if the amount of costs be not specified, and the action be in an inferior court, so that they cannot be taxed, and therefore the arbitrator ought to have fixed the sum, or if the arbitrator be specially directed to ascertain the amount himself, the court will hold the plaintiff may enforce the award as to the specified sum for the debt or damages (*b*).

Bad part separable, though no excess.

Award uncertain as to part.

Alternative award.

We have previously seen that in the case of an alternative award, if the award be bad as to one alternative, or if it be impossible or uncertain, the award is good and absolute as to the other (*c*).

Bad part inseparable, award wholly void.

II. *When the bad part of the award is inseparable.*]—If the objectionable provisions in the award be inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided (*d*).

The following cases are examples of the rule, and show in what instances a direction which the arbitrator has no power to make will vitiate the award.

Excess inseparable, award void.

Where an arbitrator, who had no power to order a verdict to be entered, made an award in these terms: "I award and direct that a verdict in this cause be finally entered for the plaintiff, with £284 12*s*." damages, the court, agreeing that if the faulty part had been contained in a distinct paragraph it might have been rejected, and the rest sustained, held the

(*b*) Morgan v. Smith, 1 Dowl. N. S. 617; England v. Davison, 9 Dowl. 1052; Addison v. Gray, 2 Wils. 293; Bargrave v. Atkins, 3 Lev. 413; Pinkny v. Bullock, cited 3 Lev. 413.

(*c*) Simmonds v. Swaine, 1 Taunt. 548; Wharton v. King, 2 B. & Ad. 528; ante, p. 270.

(*d*) Candler v. Fuller, Willes, 62; Storke v. De Smeth, Willes, 66; Bowes v. Fernie, 4 M. & C 150.

award bad in toto, since the whole being comprised in one sentence, the clause containing the excess could not be divided from the rest (*e*).

Single sum including matters not referred.

If the arbitrator award collectively on matters within and matters not within the submission, so that the court cannot see how much of the adjudication applies to each, the award will be bad in toto. For example, if the arbitrator have no power to give interest beyond the submission, and he award one entire sum for principal and interest to a day subsequent to the submission, unless the court can separate the amount given for interest beyond the submission, the whole award must be set aside (*f*).

Lease for too long term.

By the terms of an agreement, a lease of a colliery was to be granted for sixty-three years, from the 1st May, 1801, the lessees to be allowed three years for winning the colliery rent free. An arbitrator, to whom it was referred "to give such directions as to a lease, according to the agreement, as he should think fit," having directed a lease for sixty-three years from the 1st May, 1804, was held to have exceeded his authority, as the sixty-three years were, by the agreement, to be counted from the 1st May, 1801, and he had no power to go beyond the agreement; and the award was held void altogether (*g*).

Price to be paid at future day.

Where an arbitrator, appointed to determine the purchase price of an estate, exceeds his authority after fixing a price, by directing payment at a future day, it seems the direction as to the future day of payment is not separable, so as to leave the award as to the price valid, for the court will not take upon itself to say that the time of payment has not some connexion with the amount awarded (*h*).

Costs as between attorney and client.

Where the arbitrators awarded, among other things, that the action should cease, that the defendant should pay the plaintiff £50 towards the costs incurred in the cause and reference, that the plaintiff should pay his own costs of the cause and reference, and should also pay to the defendant

(*e*) Jackson v. Clarke, M'Lel & Y. 200.

(*f*) Watkins v. Phillpotts, M'Lel. & Y. 393.

(*g*) Bonner v. Liddell, 1 B. & B. 80.

(*h*) Emery v. Wase, 8 Ves. 504, a.

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the costs of the defendant in the cause and reference, the said costs to be taxed as between attorney and client, the court, holding that the arbitrators had exceeded their authority in awarding costs as between attorney and client, set aside the whole award, since the direction to tax the costs as between attorney and client was so connected with the benefit intended to be granted to the defendant, that they could not reject it and sustain the rest (*i*).

Unauthorized deductions.

On a reference, among other things respecting the defendant's bill of costs as an attorney, the arbitrator was to ascertain the balance between the parties, *but no question of liability was to be raised*; the court held that the arbitrator ought not to have made any deductions from the defendant's bill on account of his not having been admitted an attorney of one of the superior courts of Westminster; and on it being shown by affidavits that he had made such deductions, they set aside the whole award (*k*).

In a case in equity, where the arbitrator, (who by the submission had no authority to disallow a particular sum admitted by the defendants,) after finding the general balance due from them, stated in his award that in the accounts he had not charged them with the sum in question, although the defendants, when the award was pronounced bad for the disallowance, offered to allow that sum in account against themselves, the Master of the Rolls held that the error could not be so cured, and set aside the whole award (*l*).

Direction depending on excess.

An award provided, that if the defendant, before a certain day, could show that he had delivered certain currants to the plaintiff, then the arbitrators or an umpire would make a further award, but if he could not show it, that the plaintiff should be free from any claim. The award then added, that the defendant should pay a certain sum to the plaintiff, unless the arbitrators or the umpire made a further award respecting the currants within a certain time. The court held the award void, though there was no further award made, as

(*i*) Seckham v. Babb, 8 Dowl. W. 32.
167; S. C. 6 M. & W. 129.
(*k*) Harries v. Thomas, 2 M. & (*l*) Skipworth v. Skipworth, 9 Beav. 135.

they considered the last clause, ordering the defendant to pay, had dependence on the first part, which was void as contemplating the making of a further award, which was beyond the arbitrators' power (*m*).

Difficulty in separating bad from good part.

Where an arbitrator, who had to settle the terms of a lease, among other things ordered the premises to be put in repair, to the satisfaction of a third party named, this provision being void, as a delegation of authority, was held to render the whole award void, as being inseparable from the rest. In giving judgment, Lord Denman, C. J., made the following remark: "I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other, and each may be varied by the view which he takes of the whole" (*n*).

This observation is worthy of attention, since it seems to embody the principle on which the courts will act at the present day, when they are called upon to decide whether an award clearly bad in part can be separated as to the remainder, for it must often happen that a direction perfectly separable as far as the grammatical construction of the award is concerned, is the ground on which the arbitrator has proceeded in making some equivalent provision affecting the other party.

Old rule, something well awarded to each.

In many of the old cases, the courts held that awards were to be sustained, whatever portions were struck out as improperly awarded, provided in the end there remained something awarded on each side, so as in a technical manner to satisfy the rule respecting mutuality, although the award so modified amounted to a very different measure of reciprocity from that which the arbitrator intended (*o*).

Bond with sureties.

Thus where the arbitrator ordered the defendant to execute a bond for the payment of money to the plaintiff, with two sureties, and that thereupon the plaintiff should

(*m*) Brown v. Dalton, Rolle Ab. Arb. H. 10, p. 259.

(*n*) Tomlin v. Mayor of Fordwich, 5 A. & E. 147.

(*o*) Joyce v. Haines, Hard. 399; Harris v. Knipe, 1 Lev. 58; Bargrave v. Atkins, 3 Lev. 413; Lindsey v. Aston, 2 Bulst. 38; Lee v. Elkins, 12 Mod. 585; Osborn's case, 10 Rep. 129 b.; Bedell v. Moor, cited 10 Rep. 131 b.

execute a release, the court held the direction as to the sureties void, but good as to the defendant, and that the plaintiff would be bound to execute a release as soon as the defendant should deliver a bond signed by himself alone (*p*). The effect of the above decision, it will be seen, was to compel the plaintiff to accept a slighter security than the arbitrator designed, as an equivalent for his executing the release.

Modern rule, award bad if reprocity altered.

A rule, however, more consonant to the principles of justice has long been adopted; for if by the nullity of the award in any part, one of the parties cannot have the benefit intended him as a recompense or consideration of that which he is to do to the other, the award will usually be treated as void in the whole (*q*).

Thus an award that one should pay the money due for task-work, (without saying what sum,) and that the other should pay £25, and that both should give general releases, being uncertain and void as to the task-work, is void as to the whole, although mutual releases were awarded, for the payment for the task-work, as well as the general release, was intended as a recompense for the £25 on the other side (*r*). So also an award that the defendant should have certain trees, and that he should give security to the plaintiff for the payment of a specified sum is void; the latter direction is bad, for not stating with certainty what security, and one part being void, the other part must be void too, or else there would be an advantage to one party only (*s*). So where the payment of a sum of money was directed to be made to A., on A. his wife and son conveying an estate, as the wife and son were not parties to the submission, the direction as to them was void, and therefore the whole

(*p*) Thursby v. Helbert, Carth. 159; S. C. 1 Show. 82, 3 Mod. 272; See Norwich v. Norwich, 3 Leon. 62; Furlong v. Thornigold, 12 Mod. 533; Cooke v. Whorwood, 2 Saund. 337.

(*q*) Bac. Ab. Arb. E. 3; Rolle Ab. Arb. K. 8, p. 253; Com. Dig. Arb. E. 14; Winch v. Saunders, Cro. Jac. 584; See notes to Pope v. Brett, 2 Saund. 293, b.

(*r*) Pope v. Brett, 2 Saund. 293, b.; Com. Dig. Arb. E. 14.

(*s*) Bac. Ab. Arb. E. 3; Thinne v. Rigby, Cro. Jac. 314.

award was void, since the party could not enforce the intended equivalent for which his money was to be paid (*t*).

Costs affected by void part.

So where after issue joined a cause was referred, but no power was given to award a verdict, and the arbitrator awarded a verdict for the defendant, and directed mutual releases to be executed of all manner of actions, &c., the court held the award to be wholly void for the excess of authority in awarding a verdict, since the costs of the cause being to abide the event, if the direction respecting the verdict were struck out, there would be no determination of the cause for the defendant, and so he would lose his costs of the cause, and thus the sense of the rest of the award would be altered (*u*).

Excess affecting decision as to rest.

So on a reference between assignees of a bankrupt and a banking company, respecting some bills of exchange, where the arbitrator awarded that the bills were the property of the assignees, and that the bills, monies, and proceeds should be paid to them, and that in case the bank should have received any portion of the money secured by the bills they should pay the same to the assignees, the court assuming that the arbitrator's direction respecting the proceeds was an excess of authority, held the award bad in toto, because they could not say but that his view as to the proceeds affected his determination as to the rest (*x*).

(*t*) Barney v. Fairchild, Rolle Ab. Arb. N. 9, p. 259.

(*u*) Hawkyard v. Stocks, 2 D. & L. 936.

(*x*) Marshall v. Dresser, In re, 3 Q. B. 878.

SECTION X.

THE AWARD UNDER THE LANDS CLAUSES CONSOLIDATION ACT.

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Awarding under the Lands Clauses Consolidation Act.

On references within the provisions of "The Lands Clauses Consolidation Act, 1845" (*a*), to settle the amount of compensation to be paid to parties for lands taken under the authority of parliament for the purposes of a public undertaking, or injuriously affected by the erection of the works, an important question arises, whether the arbitrators are to assume the statement in the claim made by a party interested or entitled to sell, as to the nature of his interest, to be correct, and to estimate the compensation according to the interest claimed; or whether they are to try the correctness of the claim, and if they find that the party has not the interest claimed, to award him nothing; or whether they should award him a compensation according to such interest (different from that claimed) as he is proved to possess.

Suggestions as to duty of the arbitrators.

As the arbitrators appointed under this act are often persons not conversant with legal pursuits, the following suggestions, arising from a consideration of the several provisions of the statute, are made, as it is hoped that in the absence as yet of any judicial interpretation, they may be of use in guiding the arbitrators to a correct judgment as to the course they ought to pursue.

Claim must state nature of interest.

When a party interested or entitled to sell desires to have the amount of compensation to be paid him settled by arbitration, he is expressly required in his notice to the promoters, signifying such desire, to state the nature of the interest in respect of which he claims compensation, and the amount of compensation so claimed [ss. 23, 68].

From this it would seem that the question which

(*a*) 8 & 9 Vic. c. 18. See Appendix of Statutes.

the arbitrators are appointed to decide [s. 25], is not the amount of compensation generally, but the amount of compensation in respect of the interest stated in the claim. It may therefore be contended with much force, that to give compensation in respect of a different interest from that claimed, would be an awarding in respect of a matter not submitted, and consequently an excess of authority. The express language of the act, and the reason of the thing, forbid us to suppose that the statement of the nature of the claimant's interest can be deemed other than an essential preliminary, as such statement is the guide to the promoters in treating with the party for the purchase of the lands, and in making an offer of a specific sum in respect of his interest; which latter is an important step, as the costs of the arbitration depend on the question whether the arbitrators award a greater amount than that offered [s. 34].

Whether arbitrators can go beyond claim.

Supposing, from the above considerations, that the arbitrators are inclined to think that they ought not to go beyond the claim, the question still remains, whether they ought to try the correctness of the claim, if disputed, or whether they should assume it to be correct, and only inquire as to the amount of compensation.

Whether arbitrators to try justice of claim.

It may be observed that it does not seem to be contemplated by the Act that the arbitrators are to decide any question of title. The statute intends the award to be final and conclusive on the matters on which the arbitrators have to decide, namely, the amount of compensation: yet it is clear that the promoters are not bound by the arbitrators' awarding in respect of a claim, to make any compensation to the party if he have no real title. For if, on tender of the purchase-money or compensation awarded, the party "neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking," the latter may "deposit the purchase-money or compensation payable in respect of such lands, or any interest therein in the Bank in the name of the Accountant-general," &c., "to be placed there to the credit of the par-

Arbitrators not to try title.

Party failing to make title deposit of compensation in the Bank.

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ties interested in such lands, (describing them as far as the promoters of the undertaking can do,) subject to the control and disposition" of the Court of Equity (*b*).

On deposit estates to vest in promoters.

This course relieves the promoters from deciding any question of title, for after such deposit, on executing a certain deed poll, "all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands." [s. 77].

Party claiming greater title than he has.

Under somewhat similar provisions in a Railway Act, a leasehold property, professed to be sold by the lessee, was held in equity to vest in the railway company, although a party claimed as under-tenant to be entitled to an apportioned part of the price, and the court directed an issue as to his interest and the proportionate value of it (*c*).

Apportionment by equity of compensation deposited.

Under the Lands Clauses Act the parties interested may try the question of title in equity, for on petition of any party making claim to the money deposited, or to the lands in respect of which it is deposited, or any interest in the same, the court may order the money to be invested in the funds, or may order distribution thereof, or payment of the dividends thereof,

(*b*) S. 76. "If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation, either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands or any interest therein, in the Bank, in the name and with the privity of the Accountant-general of the Court of Chancery in England, or the Court of Exchequer in Ireland, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands, (describing them, so far as the promoters of the undertaking can do,) subject to the control and disposition of the said court."

(*c*) Issauchaud, Ex parte, 3 Y. & C. 721. See as to tenant for a term of years selling the fee by mistake. Jones, Ex parte, 4 Y. & C. 466.

according to the respective estates, titles, or interests of the parties making claim to such money or lands (*d*).

Advisable for arbitrators to award according to the claim.

The result of these observations seems to lead to the inference, that it is not the arbitrators' province to decide whether a party interested in the lands be entitled to compensation in respect of the right claimed, but only to assess the amount of purchase money and compensation due in respect of the right claimed; and that, at all events, the fitter course for the arbitrators to pursue is to make such assessment (*e*).

Duty in estimating damage from severance.

In estimating the amount of damages arising from severance, and other injuries from the execution of the works, it is presumed that the arbitrators should not, in the case of a railway, treat it as one of total severance, bnt should remember that by "The Railways Clauses Consolidation Act, 1845," the company are bound to make such means of communication between the severed lands, and to provide such drains and watering places for cattle, to remedy the inconveniences caused by the railway, as, in case of dispute, two justices shall appoint (*f*).

What recitals advisable in the award.

It is advisable that the award should recite all those facts which are necessary to give the arbitrators jurisdiction. It should, therefore, shortly allege the right of the promoters of the undertaking under their Act to take the lands in question, their notice to the party offering to treat for the purchase of his interest, the claim by the party for compensation, the statement of the nature of his interest, the disagree-

(*d*) S. 78. "Upon the application, by petition, of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the said Court of Chancery in England, or the Court of Exchequer in Ireland, may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such court shall seem fit."

(*e*) See Walker v. London and Blackwall Railway Company, 3 Q. B. 744. See also Bradshaw, Ex parte, Q. B., June 2, 1848, stated fully, p. 332.

(*f*) 8 & 9 Vict. c. 20, s. 68—75. Manning v. Eastern Counties Railway Comp., 12 M. & W. 237.

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ment respecting the amount of compensation, the demand by the party to have the matter settled by arbitration, the appointment of the arbitrators and umpire, the delivery to them of such appointments, and the making and subscribing by them of the declaration required by the Act, before entering on the matters referred. The arbitrators are also recommended to state that in calculating the compensation they have had regard to the principles prescribed by the statute for assessing the amount.

Misdescription of subject matter.

A mis-description or variance in the statement of the subject matter on which they profess to award is a serious error. Thus, if they be appointed to ascertain the amount of compensation to be paid to a party for his *interest* in the land required by the promoters, and they award in terms respecting the *value* of the land, grave questions may be raised respecting the validity of their decision (*g*).

Delivery of award to promoters.

The award must be in writing, and is to be delivered to the promoters; and the latter, on demand, at their own expense, are to furnish the other party with a copy (*h*).

Declaration to be annexed to award.

The declarations made and subscribed by the arbitrators or umpire before entering upon the matters referred, must be annexed to the award when made (*i*).

Award not void through error in form.

"No award made with respect to any question referred to arbitration, under the provisions of this or the special Act, shall be set aside for irregularity or error in matter of form" (*k*).

What a sufficient award under the Act.

As the following case throws considerable light upon the duty of arbitrators under the Act, it is given at some length.

Notice to treat.

A railway company sent a notice, in writing, to a person named Bradshaw, stating that they required for the purposes of their railway, and were willing to treat for the purchase of certain lands and premises specified in the schedule to the notice, and they required him to state the nature of his estate and interest in them, as well as the amount of his

(*g*) See Barker v. North Staffordshire Railway Company, 12 Jur. 324.

(*h*) 8 & 9 Vict. c. 18, s. 35.

(*i*) 8 & 9 Vict. c. 18, s. 33.

(*k*) 8 & 9 Vict. c. 18, s. 37.

claim for compensation. In the schedule they described Bradshaw as the owner or reputed owner of the premises to be taken, and one Low as occupier of part, and one Baum as lessee and occupier of the remainder.

Claim stating nature of interest.

Bradshaw accordingly filling up a printed form given him by the company, sent in his claim for a large amount, and under the head, "nature of interest," he wrote the words "fee simple in possession." He did not in any part of the document allude to the fact that any part of the land was under lease, except so far that he claimed "as the value of the manor-house," &c., "described by the No. 9 in such notice, and in the occupation of John Baum, £1,500."

Appointment of arbitrator by claimant.

In the appointment of an arbitrator on his part, he specified that the matter on which the arbitrator had to award was as follows: "To settle the compensation to be paid to me by the said company for the fee simple in possession of and in the lands," &c., "in the occupation of John Low described in the said notice, the manor-house," &c., "in the occupation of John Baum, which said manor-house," &c., "are subject to a lease thereof granted to Baum for a term of years that will expire in Michaelmas, 1850, at the yearly rent of £34, all which premises are described or referred to in my aforesaid claim; and for injury and damage by reason of the severance of my said land; and for all other injury, damage, costs, charges, and expenses, mentioned and detailed in my claim hereinbefore recited."

Appointment by the company.

The company appointed their arbitrator to assess the compensation to be paid to Bradshaw, "for his interest in the lands and hereditaments specified in the schedule," (which agreed with the original notice,) "hereunder written, and for the damage to be sustained by the said W. Bradshaw by reason of the execution of the works of the said railway."

Award.

The arbitrators not making any award, the umpire awarded in the following terms:—"I do award, decide, and determine, that the amount or sum of money to be paid by the said company to the said William Bradshaw, his heirs, executors, administrators, and assigns, as and for and by

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way of compensation and consideration money for the absolute purchase of the fee simple in possession, free from incumbrances, (save and except the tithe commutation rent charge,) of all those pieces or parcels of land, hereditaments, and premises so agreed to be purchased as aforesaid, and particularly mentioned and described in the said schedule (*l*) hereunder written, and numbered respectively 1, 3, 4, 8, 9, and 10, on the said plan hereunto annexed and colored red, and also for the purchase of all and every estate, right, share, and interest of him the said W. Bradshaw, and his heirs, executors, administrators, or assigns, in, upon, or affecting the said lands, hereditaments, and premises, or any part thereof, *and also for the immediate possession thereof*, and also as and for compensation for all damage sustained by the said W. Bradshaw by reason of the severing of the said lands, hereditaments, and premises hereinbefore described from the other lands, hereditaments, and premises of the said W. Bradshaw, or otherwise injuriously affecting such other lands, hereditaments, and premises, shall be the sum of £2,560 of lawful money of Great Britain, the same being in my judgment the fair, just, and reasonable value of the said lands, hereditaments, and premises."

Grounds of motion to set aside award.

Bradshaw being dissatisfied with the award, applied to the Court of Queen's Bench to set it aside on various grounds: Firstly, that the umpire had awarded the price to be paid for the lands and the damage by severance, &c., in one sum. Secondly. That he had awarded a sum for the value of the land, and for the immediate possession thereof; whereas it appeared by the claim, that the claimant had not possession, and could not give immediate possession. Thirdly. That the umpire had exceeded his authority in awarding a sum to be paid for the immediate possession of the land.

Judgment of court.

The court, however, held the award to be good, giving judgment as to these objections in the following terms:—"In this case several objections were made against the award of

(*l*) The schedule merely described the property, but said nothing about the occupation or tenancy.

the umpire. First, that one sum was awarded for damages and price instead of a separate sum on each account. The answer is, that in respect of arbitrations there is no requirement in the statute for separate assessments, and that in respect to verdicts upon inquisitions, such requirements as are in section 49 of the present statute are directory, and not conditional. *In re London and Greenwich Railway Company* (*m*), *Corrigal* v. *London and Blackwall Railway Company* (*n*). Secondly and thirdly, that the award assumes the claimant to be in possession. The answer is, such assumption, if actually made, is in his favor and to his advantage, and therefore no matter of complaint for him. But it does not appear clearly that such assumption was made. The expression, "fee simple in possession," in the claim, is used in contradistinction to fee simple in the reversion or remainder. The compensation given can only be taken to be in respect of what was claimed, and if the tenants have any claim in respect of the actual possession of the land, their remedy is against the company, and not against the owner of the fee" (*o*).

Award of joint sum for price and damage sufficient.

Award presumed to be according to the claim.

(*m*) 2 A & E. 678.
(*n*) 5 M. & G. 219.
(*o*) Bradshaw v. East & West India Docks & Birmingham Junction Railway Comp., Q. B., June 2, 1848.

CHAPTER VI.

THE DUTY OF THE ARBITRATOR IN AWARDING ON THE CAUSE OR SUIT REFERRED.

Object and contents of the sixth chapter.

A very important branch of the arbitrator's duty consists in his determining by his award actions at law and suits in equity. As these are referred at different stages, and subject to varying conditions, what is a sufficient determination under one submission will often be inadequate under another.

In this chapter, therefore, it is attempted to collect how the arbitrator may best award on an action or suit according to the particular case referred. The first section points out shortly the modes of disposing of an action without deciding it, when the submission (which is rarely the case) permits such a course. The second section shows the duty of deciding the action in favor of the party entitled to succeed, and of awarding on every issue joined in the cause, when the costs of the cause abide the event of the award. In the third section an investigation is made of the power of the arbitrator to direct a verdict to be entered in the action, of the manner in which, when empowered, he should perform his duty in this respect, and of the consequences of directing such an entry without authority. The duty of the arbitrator in awarding damages is laid down in section four: while

section five examines under what circumstances the arbitrator may direct judgment to be entered or arrested, or decide on the plaintiff's right to judgment non obstante veredicto. The sixth and last section treats of the determination of a suit in equity.

SECTION I.

OF DISPOSING OF THE CAUSE WITHOUT DECIDING IT.

When disposing of cause without deciding it sufficient.

When the terms of the submisssion are such that the award will be final and certain, without showing in whose favor the cause referred is decided, (though that is rarely the case, and never when costs abide the event of the cause,) it is sufficient if the arbitrator somehow dispose of the cause absolutely.

Awarding suits to cease.

It has been decided by the courts of common law that an award that all suits now pending between the parties shall cease is a final determination of the suits, for the meaning of such an award is, not that the party shall be nonsuited or give over and begin again, but that the suit should cease absolutely for ever, so that the right itself is gone because the remedy is quite taken away, for if the suit fail the party has no remedy to come at his right (*a*). In one instance, however, in an old case, a direction that all manner of proceedings, if any, depending at law should be no further prosecuted, was held not to be final, or to prevent the plaintiff from bringing a suit, if he had not brought one, or if he had, from discontinuing that which he had brought and bringing a new one (*b*).

(*a*) Simon v. Gavil, 1 Salk. 74; Knight v. Burton, 1 Salk. 75.

(*b*) Tipping v. Smith, 2 Stra. 1024.

An award of a nonsuit is not a good determination of the cause, for in its nature it is not final (*c*).

Awarding nonsuit not final.

Where a cause and all matters in difference were referred, and the arbitrator was empowered to direct a verdict or a nonsuit to be entered, and the award did not decide the matters in the cause otherwise than by directing that the verdict entered for the plaintiff should be vacated and a nonsuit entered, this award was held bad, (Parke, B., dissentiente,) as not finally determining the matters in difference in the cause; for it was considered by the rest of the court that the arbitrator ought to have expressly decided on the matters in difference in the cause, and that the power to enter a nonsuit was given merely to enable him to dispose of the record, that though a verdict decides the matters in difference in the cause, a nonsuit does not, or prevent a fresh action for the same matter: Parke, B., however, held that the directing a nonsuit was sufficiently final, as it was a determination of the cause in the manner the parties themselves had stipulated (*d*).

Directing a stet processus.

An award that each party should pay his costs of certain actions, and that the actions be discontinued, has been held final and good, and in effect an award of a stet processus (*e*).

(*c*) Knight v. Burton, 1 Salk. 161.

(*d*) Wild v. Holt, 9 M. & W. 75.

(*e*) Blanchard v. Lilly, 9 East, 497; Gray v. Gray, Cro. Jac. 525.

SECTION II.

OF AWARDING ON THE CAUSE WHEN COSTS ABIDE THE EVENT.

Costs abide event.

1. *The arbitrator must decide the cause when costs abide the event.*]—The common provision that the costs of the cause are to abide the event imposes on the arbitrator the necessity of peculiar strictness in properly deciding the cause in his award.

Award of a stet processus bad.

If by the submission the costs of the cause are to abide the event as to the cause, the arbitrator must determine the cause in favor of one party or the other, and not merely dispose of it; so that he will not be justified in awarding a stet processus, because by so doing he would be exercising a discretion as to the costs, over which he has no control: for the awarding a stet processus prevents either party having the costs, as they are to abide the *legal* event, and there is no *legal* event of the cause on which they can be taxed when there is no decision in favor of either party (*a*).

Not when issues also decided.

If, however, the arbitrator decide all the issues, and then direct that no further proceedings shall be taken in the action, though this award of a stet processus be void as an excess of authority, yet it will not vitiate the award, as there being a decision on the issues there is a legal event on which the officer of the court can tax the costs (*b*). So on the reference of an action of trover to which the defendant had pleaded not guilty and not possessed, where the costs were to abide the event, and the arbitrator awarded that the cause should cease and be no further prosecuted, and that the defendant should pay a certain sum to the plaintiff, Erle, J., held that the event was sufficiently determined (*c*).

(*a*) Hunt v. Hunt, 5 Dowl, 442; Norris v. Daniel, 10 Bing. 507; Leeming & Fearnley, In re, 5 B. & Ad. 403.

(*b*) Ward v. Hall, 9 Dowl. 610.

(*c*) Hobson v. Stewart, 16 L. J., Q. B. 145; S. C. 4 D. & L. 589.

Awarding cause to cease bad.

Merely directing the action to cease, either wholly or partially, is insufficient. Thus where the arbitrator found that the plaintiff had good cause of action on five out of eight counts, and ordered that the defendant should pay certain damages, and that no further proceedings should be had in the action, it was held that as there was no award as to three counts, and no event to authorize the taxation of costs on those counts, that consequently no part of the award could stand (*d*). But where the declaration contained eleven special counts for negligence, and also common counts for money paid, and there was a plea of the general issue, and the arbitrator found that the plaintiff had good cause of action for a specified sum, and directed a verdict to be entered for that sum, the award was considered sufficient, as a finding on all the counts (*e*).

Award of general verdict.

Replevin finding as to rent.

Directing that an action of replevin should cease and be no further prosecuted, that the rent agreed on was £14, and that £6 was due for such rent at the time of the distress complained of, was not considered a sufficient determination of the action in the defendant's favor; since the rent for which the defendant avowed might have been a different rent from that awarded due, and so the award as to the rent was not necessarily a decision of the avowry in the defendant's favor (*f*).

Award on the whole showing cause decided.

II. *What a sufficient decision before the new rules for taxing costs.*]—It was sufficient, before the late regulations in the courts of law about taxing the costs of particular issues for the party who succeeds on them, if looking to the whole award, though there was no express termination of the cause, the court could see that the cause was determined in favor of either party, so as to make an event on which costs could be taxed.

Thus, on a reference of all matters in difference, including

(*d*) Norris v. Daniel, 10 Bing. 507.

(*e*) Dicas v. Jay, 5 Bing. 281; Gisborne v. Hart, 5 M. & W. 50.

(*f*) Leeming v. Fearnley, In re, 5 B. & Ad. 403.

an action by a landlord against his tenant for breach of covenants in a lease, the award awarding that the plaintiff had no claim or demand on the defendant on account of any alleged breaches of covenant or otherwise, and that the defendant had no claim on the plaintiff, was held to be a final decision and good (*g*). On a reference of a cause and all matters in difference, an award that "nothing is due to the plaintiff" has been held a sufficient finding that the plaintiff has no right to recover in the action referred (*h*).

Action for nuisance.

An action for a nuisance, to which a plea of the general issue was pleaded, (before the new rules for pleading,) was referred, the costs to abide the event: the arbitrator awarded that the plaintiff had not proved that the defendant was the cause of the injury, and that the verdict taken for the plaintiff should be set aside and a nonsuit entered; but he also ordered that the defendant should remove the nuisance within a month. This was held to be substantially a finding in favor of the defendant, and to entitle him to the costs of all witnesses that could be material to him for any defence under the general issue (*i*).

An award in an action (in which £10 had been paid into court) that the plaintiff had no cause of action except for £10 lent by him to the defendant's wife when sole, and which had been brought into court, is an award in favor of the defendant, and determines the event as to costs (*k*).

On the reference of an action of ejectment before trial the submission provided that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law: the award directed the defendant to give up the premises to the plaintiff, to pay the costs of the action, and to pay a specified sum for the loss of rent during the time he held over: the court considered this direction a sufficient decision, and enforced payment of the sum and costs by attachment, although the arbitrator had not in

(*g*) Jackson v. Yabsley, 5 B. & A. 848.

(*h*) Dickins v. Jarvis. 5 B. & C. 528.

(*i*) Radcliffe v. Hall, 3 Dowl. 802.

(*k*) Dawson v. Garrett, 2 Dowl. 624.

terms awarded that the plaintiff had any cause of action (*l*).

Cause referred before plea, arbitrator need not decide each count.

III. *Deciding cause referred before plea since the new rules as to costs.*]—When a cause is referred before plea, notwithstanding the declaration contains several counts, the arbitrator is not bound by the recent rules for taxing the costs of the separate issues in favor of the party successful on each respectively (*m*) to find specifically on each count, though the costs of the cause abide the event, for before plea pleaded it is impossible to say what the issues will be (*n*). It is sufficient if he decide in whose favor the cause is determined.

Award of cause to cease and damages.

Thus, an action of trespass, in which the declaration had been delivered, and an action of assumpsit, in which a writ only had been issued by the same plaintiff against the same defendant, having been referred with all matters in difference; although it was objected that the award, which ordered that all proceedings in the causes should cease and be no further prosecuted, and that the defendant should pay the plaintiff a sum of money "in full of all demands in the said causes," was not final, as it did not determine the causes, but only decided that on the whole the plaintiff was entitled to a balance, and did not show any event on which the costs of the causes could be ascertained; the court held the award good as amounting to a determination of both causes in favor of the plaintiff; as they would reasonably import that the plaintiff was entitled to recover something in each of the actions, and that it was not necessary to specify how much the plaintiff was entitled to in each (*o*).

Cause to cease, and payment of balance.

So where an action to recover a sum alleged to be due on a balance of accounts was referred with all matters in difference after appearance, (the defendant claiming a set-off

(*l*) Doe d. Williams v. Richardson, 8 Taunt. 697.

(*m*) 1 Reg. Gen., H. T. 2 W. IV. r. 74; 3 B. & Ad. 385.

(*n*) Bearup v. Peacock, 2 D. & L. 850.

(*o*) Wynne v. Edwards, 12 M. & W. 708.

exceeding the plaintiff's claim,) and the arbitrators awarded that the action should cease and be no further prosecuted, that on the balance of accounts a certain sum was due from the plaintiff to the defendant which they directed the plaintiff to pay, the court, though deeming it incumbent on the arbitrators to show in whose favor the suit was determined, as well as to pronounce who was entitled on the balance of the accounts, held that the award was final, since the arbitrators had in fact determined the action in favor of the defendant by directing the action to cease, and awarding that on the balance of the accounts there was a sum due to the defendant (*p*).

How to award on cause referred before plea.

When a cause is referred before plea, and the arbitrator has no power to order a verdict to be entered, the legal and proper form of deciding the action, if in favor of the plaintiff, is, to award that the plaintiff has a good cause of action against the defendant, and then to assess and direct payment of the amount to which the plaintiff is entitled in respect of the same; if in favour of the defendant, to award that the plaintiff has no cause of action against the defendant (*q*).

Cause referred after issue joined, arbitrator must find on each.

IV. *Awarding on the issues since the new rules as to costs.*]—When a cause is referred after issue joined, and the costs of the cause are to abide the event of the award, it is incumbent on the arbitrator, whether he has to make an award or only a certificate, either to dispose specifically of each issue, or so to adjudicate that it can be clearly inferred from the award or certificate in which way each of the issues has been determined, so as to enable the officer of the court to tax the costs for the party in whose favor each issue respectively has been found (*r*).

(*p*) Eardley v. Steer, 4 Dowl. 423; S. C. 2 C. M. & R. 327; Harding v. Forshaw, 1 M. & W. 415.

(*q*) Eardley v. Steer, 2 C. M. & R. 327; S. C. 4 Dowl. 423; Harding v. Forshaw, 1 M. & W. 415.

(*r*) Brooks v. Parsons, 1 D. & L. 691; Kilburn v. Kilburn, 13 M. & W. 671; Bourke v. Lloyd, 2 Dowl. N. S. 452; Hunt v. Hunt, 5 Dowl. 442; Stonehewer v. Farrar, 6 Q. B. 730.

New rule for taxing costs.

This necessity of determining each issue, although the substantial merits have been previously fully disposed of, arises from a rule of court, which provides that "no costs shall be allowed on taxation to a plaintiff, on any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs" (*s*). It will here be seen that unless the arbitrator find distinctly on each issue, there is no legal event to authorize the taxation of costs, in accordance with the above rule (*t*).

No request necessary.

In one instance, the Court of Exchequer decided that where a finding on specific issues was material only with respect to costs, an award was not to be set aside for the omission to determine each issue, unless the arbitrator had been requested distinctly to find on each (*u*). The propriety of that decision has, however, been gravely doubted in one instance (*x*), and in another entirely denied, on the ground that when the submission places the very point under the arbitrator's view, neither notice or request is necessary to make it his duty to decide upon it (*y*). It certainly has not been followed as law in more recent cases, and may now be considered as completely overruled. The case of *Duckworth* v. *Harrison* (*z*), which had been mistakenly supposed to support the doctrine of *Dibben* v. *Marquis of Anglesey* (*a*), was explained by Lord Abinger, C.B., to mean merely this, that when the costs of the cause do not abide the event, in order to make it incumbent on the arbitrator to find on each issue, words should be introduced into the order of reference, calling upon him to decide on each (*b*)

Arbitrator must award on each count.

As the issues must be specifically or substantially decided, if the issue on any count of the declaration be left undetermined, the award is bad.

(*s*) 1 Reg. Gen. H. T. 2 W. IV. r. 74; 3 B. & Ad. 385.
(*t*) See Rennie v. Mills, 5 Bing. N. C. 249.
(*u*) Dibben v. Marq. Anglesey, 10 Bing. 568.
(*x*) Gisborne v. Hart, 5 M. & W. 57.
(*y*) England v. Davison, 9 Dowl. 1052.
(*z*) 4 M. & W. 432.
(*a*) 10 Bing. 568.
(*b*) Bourke v. Lloyd, 2 Dowl. N. S. 452; S. C. 10 M. & W. 550.

If a declaration contain two counts, one on a promissory note, and the other on an account stated, an award that the plaintiff has good cause of action for a certain sum, being the amount of the promissory note, is bad, since it does not dispose of the issue on the account stated in favor of either party (*c*).

Account stated.

So if there be a plea of non assumpsit to a declaration containing several counts, and the arbitrator find that the defendant is justly indebted to the plaintiff in a certain sum, this award is defective; since, although it determines that on some one or more of the counts the defendant is liable, it does not necessarily determine the issues raised by that plea on each of the counts (*d*).

Defendant indebted.

But if to a declaration containing several of the ordinary indebitatus counts, the defendant plead, first, non assumpsit, and also three other pleas, and the arbitrator, find, "as to the issues firstly, thirdly, and lastly, joined," that the verdict should stand for the plaintiff, and on second issue for the defendant, this is sufficient; since it amounts not merely to an award on the issue raised by the plea of non assumpsit on the first count in the declaration, but to a finding in the plaintiff's favor of all the sub-issues raised by the issue on the plea of non assumpsit on the whole declaration; and it is unnecessary for the award to show how much is due in respect of each count, as the object of the separate finding is only to dispose of the question of costs, which is determined sufficiently by the arbitrator's finding that the defendant owes something on each count (*e*).

Issue on non assumpsit for plaintiff.

Where after issue joined in an action of covenant, but before the issue was made up, all the matters in the suit, specified in the particulars of the breaches of covenant, were referred by articles of agreement, the costs of the suit to abide the event of the award, and the arbitrator found that the plaintiff had sustained certain damages on one of the

Costs, issue joined but not made up.

(*c*) Gisborne v. Hart, 5 M. & W. 50.

(*d*) Kilburn v. Kilburn, 13 M. & W. 671; Morgan v. Thomas, 9 Jur. 92.

(*e*) Adam v. Rowe, 3 D. & L. 331; S. C. 10 Jur. 840.

breaches specified in the declaration, but that in respect of the other matters specified in the particulars, the plaintiff had sustained no injury, and had no cause of action, the court held, that though the cause were not strictly at issue, yet that the defendant, under the order of reference, was, according to the Reg. Gen. H. T. 2 W. IV. r. 74, entitled to the costs of the issues substantially found for him (*f*).

Arbitrator must find on each demise in ejectment.

For the like reason respecting costs, in ejectment, if there be several demises, the arbitrator should find on which demise the plaintiff is entitled to recover, and award for the defendant on the other demises; since the defendant is entitled to the costs of the issues on the demises found in his favor. Merely directing the general verdict taken for the plaintiff to stand is insufficient, and the award will be bad for leaving it uncertain on which demise the plaintiff is entitled. The court will not presume one part of the land recoverable on one demise, and another part on another. If such be the fact, the arbitrator should state how the right is (*g*).

Should specify lands.

Though formerly if the plaintiff proved his title to any portion of the lands claimed, the practice was to enter the verdict for him for the whole, (possession, however, only being taken for the part on which he succeeded,) yet now, since it has been decided that the verdict in ejectment is distributable, the arbitrator, if he be of opinion that the plaintiff has made out his claim to a part of the lands only, should, with a view of entitling the defendant to costs on the issue raised by the plea of not guilty as to the residue of the lands, award for the defendant as to that portion, even where other provisions of the award may render such finding for the defendant immaterial for any other purposes than those of costs (*h*).

Arbitrator must find on each plea.

The award will be bad if the arbitrator omit to decide

(*f*) Daubuz v. Rickman, 4 Dowl. 129.

(*g*) Doe d. Madkins v. Horner, 8 A. & E. 235; S. C. 3 N. & P. 344; Doe d. Starling v. Hillen, 2 Dowl. N. S. 694.

(*h*) Doe d. Bowman v. Lewis, 13 M. & W. 241; S. C. 2 D. & L. 667.

all the issues raised on the pleas. Thus where the arbitrator merely awarded that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, and neglected to decide the issues on the pleas, the court held that the award was bad, but that it was not to be set aside, provided the defendant would permit the costs of the issues on those pleas to be taxed for the plaintiff (*i*).

Whether substantial finding sufficient.

Where on the reference of an action of debt for money lent, money paid, interest, and for money due on an account stated, to which the pleas were, nunquam indebitatus, and payment, the arbitrator awarded that the plaintiff had good cause of action against the defendant, and directed the defendant to pay the plaintiff a specified sum, the court set the award aside for not deciding on each issue (*k*). It is to be observed the award does not show on which count in the declaration the money is recovered, though it substantially decides the issue on the plea of payment. Relying on the above case of *Bourke* v. *Lloyd* (*l*), Patteson, J., held bad for not specifically deciding each issue the certificate of an arbitrator, who in an action of debt for work and labour, where the defendant had pleaded nunquam indebitatus, payment, and a set-off, had certified that a verdict should be entered for the plaintiff; though it was urged that by finding a verdict for the plaintiff for a sum certain, the arbitrator must have found the issues on the pleas of payment and set-off against the defendant, and so *substantially* decided each issue (*m*).

This view of the law, that such a substantial decision was quite sufficient, was adopted by the Court of Exchequer, in a case where both the above cases were brought before their notice (*n*). That it was enough, had indeed been previously laid down by the same judge, who decided the case of

(*i*) England v. Davison, 9 Dowl. 1052; See Williamson v. Locke, 2 D. & L. 782.

(*k*) Bourke v. Lloyd, 2 Dowl. N. S. 452; S. C. 10 M. & W. 550.

(*l*) 2 Dowl. N. S. 452.

(*m*) Brooks v. Parsons, 1 D. & L. 691; See Stonehewer v. Farrar, 6 Q. B. 730; per Patteson, J. 742.

(*n*) Kilburn v. Kilburn, 13 M. & W. 671.

Brooks v. *Parsons* (*o*) just cited (*p*). The Court of Common Pleas also have decided that a finding of the arbitrator, leading by necessary inference to the decision of the issue, is sufficient (*q*). More recently still, it has been decided that when an arbitrator finds that the plaintiff has good cause of action in respect of a count to which several pleas are pleaded, each of which, if true, is a sufficient answer to the count, as, for example, in trover, where the defendant pleads not guilty and not possessed, such a finding amounts in fact to a distinct finding in plaintiff's favor on each issue (*r*).

Whether a general verdict a finding on each issue.

A question of importance arises here, whether directing a general verdict for either plaintiff or defendant can be treated as a finding on each issue. In one case (*s*), where there were several special inconsistent pleas, the court treated the awarding a general verdict for the defendant as a finding on all the issues in his favor; and in a very recent case, Parke, B., said that awarding a general verdict for the plaintiff, means a verdict on all the issues (*t*). Such, however, was not the course pursued by the court in other cases, for in *England* v. *Davison* (*u*), it was held two issues were left undecided, though there was a direction to enter a general verdict for the defendant: and in *Doe d. Starling* v. *Hillen* (*x*), there was a general verdict for the plaintiff, yet it was not considered as a finding in his favor on each of the three demises.

Proper mode of awarding on the issues.

All these nice questions may however be avoided, if the arbitrator adopt the course recommended by the Court of Queen's Bench, who have laid it down that the best and most proper mode for an arbitrator to decide the issues is, to give his award in the very terms of the issues themselves. It is not necessary for him to set out the pleadings in his

(*o*) 1 D. & L. 691.
(*p*) Hunt v. Hunt, 5 Dowl. 442.
(*q*) Avelett v. Goddard, 11 L. J., C. P. 123.
(*r*) Hobson v. Stewart, 16 L. J., Q. B. 145; S. C. 4 D. & L. 589; Williamson v. Locke, 9 Jur. 349; S. C. 2 D. & L. 782.
(*s*) Cooper v. Langdon, 9 M. & W. 60; S. C. 1 Dowl. N. S. 392.
(*t*) Dresser v. Stansfield, 14 W. & W. 822.
(*u*) 9 Dowl. 1052.
(*x*) 2 Dowl. N. S. 694.

award, or to add any general statement that he decides in favor of the plaintiff or the defendant (*y*).

Awarding on pleas of set-off and payment.

The arbitrator should also recollect, that as pleas of set-off or payment (unless, when taken together with other pleas, they answer the whole of the plaintiff's demand intended to be covered by them) are not divisible in law, it is his duty, although the defendant be entitled to some set-off, or has made some payments, to find the issues joined on such pleas for the plaintiff. He may, however, give the defendant the benefit of any smaller counter-claim, or part payment, in reduction of the plaintiff's damages (*z*). A finding of part of such pleas for the defendant, and the other part for the plaintiff, has been construed to be an informal award of damages for the portion or amount found in favor of the latter (*a*).

When arbitrator need not find on the issues.

Sometimes by agreement of parties the arbitrator is relieved from the necessity of finding on each issue, although the costs are to abide the event. Thus where the arbitrator was to settle the cause and all matters in difference, and the submission contained a stipulation that if the arbitrator should find the plaintiff not entitled to recover any debt or damages, then a verdict was to be entered for the defendant, and the arbitrator awarded that the plaintiff was not entitled to recover in the action; the court put the construction that the arbitrator was not called upon by the submission to find on each issue, but that on such a finding the parties had agreed that a verdict was to be entered for the defendant on all the issues (*b*).

Clause in submission relieving him.

Instances are so frequently occurring of awards being held bad for the neglect of the arbitrator to decide on each issue, that it has been suggested by the Court of Exchequer as advisable to introduce into the order of reference a con-

(*y*) Stonehewer v. Farrar, 9 Jur. 203; S. C. 6 Q. B. 730; Allen v. Lowe, 4 Q. B. 66; Clarke v. Owen, 2 H. & W. 324.

(*z*) Moore v. Butlin, 7 A. & E. 595; King v. Earl of Dundonald, 5 Dowl. 589; Tuck v. Tuck, 7 Dowl. 373; S. C. 5 M. & W. 109.

(*a*) King v. Earl of Dundonald, 5 Dowl. 589.

(*b*) Waddle v. Downman, 1 D. & L. 560.

dition that it shall be sufficient for the arbitrator to award in favor of the plaintiff or defendant generally, unless either party shall request him to find some particular issue or issues (*c*). Pursuant to this recommendation, a clause to the above effect is occasionally inserted in orders of reference from that court.

Duty of arbitrator when costs of cause do not abide event.

Where on the reference of a cause the costs of the cause do not abide the event of the award, but only the costs of the reference and award abide that event, it is not necessary for the arbitrator to find on each specific issue, unless specially called upon to do so by the order of reference, for the costs of the reference and award are determined by the general event of the action. Thus where to an action of debt referred, subject to the above-mentioned provision as to costs, the general issue and set-off were pleaded, and the arbitrator found that the plaintiff was not entitled to recover in the action, the award was held final, though he determined nothing respecting the set-off (*d*).

SECTION III.

OF AWARDING AN ENTRY OF A VERDICT.

No implied power to direct a verdict to be entered.

1. *When arbitrator empowered to award a verdict.*]—When a cause is referred before trial, the arbitrator has no power to direct a verdict to be entered, unless it be conferred on him by the submission in express terms (*a*.) A submission of a cause, the subject-matter thereof, the issue therein,

(*c*) Morgan v. Thomas, 9 Jur. 92.

(*d*) Duckworth v. Harrison, 4 M. & W. 432; Bourke v. Lloyd, 2 Dowl. N. S. 452.

(*a*) Angus v. Redford, 11 M. & W. 69: S. C. 2 Dowl. N. S. 735.

and the costs, does not enable the arbitrator to order such an entry (*b*). A reference of an action and all matters in difference, is equally insufficient (*c*).

Reference at Nisi Prius, but no verdict taken.

Where the reference takes place at Nisi Prius, if no verdict be taken subject to the award, the arbitrator has no power to order a verdict to be entered up, unless the submission give it him, not even where it directs that final judgment shall be entered for the plaintiff or defendan according to the award (*d*). Even a clause enabling the arbitrator to amend the record, and to direct what he shall think fit to be done by and between the parties, will not, i seems, give him the power in question (*e*).

Usual clause giving power.

On a reference at Nisi Prius, however, it generally happens that a verdict is taken for the plaintiff at a specified amount of damages, subject to the award, and that the arbitrator is expressly empowered to direct that a verdict shall be entered for the plaintiff or the defendant, as he shall think proper. Though no verdict be taken, but the cause be referred before trial, the judge's order or agreement under the statute referring it often contains a similar provision, and confers equal authority on the arbitrator (*f*).

Verdict taken, with power to settle the cause.

If a verdict be taken at Nisi Prius for a specified amount of damages, subject to a reference, and the arbitrator has power to settle the cause, but no express authority be given him to alter the verdict, he is nevertheless at liberty to direct the verdict to be entered for the plaintiff at any amount of damages less than the specified amount (*g*).

Power over the issues.

So an arbitrator empowered by order of Nisi Prius to certify for whom and for what amount, if any, a verdict should be entered in the cause referred, has the same authority as a jury of directing a verdict to be entered on the several issues, and ought to do so, and is not bound to

(*b*) Hutchinson v. Blackwell, 8 Bing. 331.

(*c*) Eardley v. Steer, 4 Dowl. 423.

(*d*) Harding v. Forshaw, 1 M. & W. 415.

(*e*) Hayward v. Phillips, 6 A. & E. 119.

(*f*) Hawkins v. Benton, 2 D. & L. 465; Angus v. Redford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735.

(*g*) Taylor v. Shuttleworth, 6 Bing. N. C. 277.

order a general verdict (*h*). Though no order of Nisi Prius be drawn up, or rule of court obtained on the verdict taken subject to the reference, the parol consent of the parties is a sufficient authority for the arbitrator to certify that a verdict should be entered, and a verdict entered pursuant to his certificate is good (*i*).

Verdict taken on one issue only.

If there be a verdict taken on one issue, with specified damages, subject to the reference, and the cause and all matters in difference be referred, it is an excess of authority for the arbitrator to direct a verdict to be entered for the plaintiff for a sum composed of the amount of the specified damages, and the damages which he assesses to be due to the plaintiff on the other issues in the cause. Nor can such a direction be construed as an order to pay the money, but the award is bad in toto (*k*).

Power in one cause gives no implied power in another.

Although at Nisi Prius a verdict be taken subject to a reference, and the arbitrator be empowered to direct a verdict to be entered for the plaintiff or the defendant, as he may think proper, and the cause, and also another cause between the same parties, and all matters of difference are referred, the arbitrator is not authorized to direct the entry of a verdict in the second cause (*l*).

Substantial decision sufficient direction.

II. *Duty of the arbitrator in awarding a verdict.*]—A strictly formal exercise of the power to direct the entry of a verdict will not be necessary to authorize the entry; though of course the clearer the language used the better. A substantial decision in favor of either party will be sufficient.

For instance, if the arbitrator by his certificate direct that a verdict be entered for the plaintiff on the first issue, and on the other, which goes to the whole cause of action, for the defendant, it is not necessary that the arbitrator should

(*h*) Woof v. Hooper, 4 Bing. N. C. 449; Williams v. Mousdale, 7 M. & W. 134.

(*i*) Tomes v. Hawkes, 10 A. & E. 32.

(*k*) Hayward v. Phillips, 6 A. & E. 119.

(*l*) Howett v. Clements, 1 C. B. 128.

expressly direct that the verdict for the agreed amount of damages should be vacated, as the direction to enter a verdict for the defendant on the second issue is inconsistent with, and consequently supersedes, the verdict taken at the trial (*m*). Where in an action of assumpsit, to which the defendant pleaded non assumpsit and set-off, and the arbitrator awarded that the plaintiff was entitled to £90 in respect of the causes of action in the declaration, and that the defendant was entitled to a set-off of £35, this was held sufficient to justify the plaintiff entering a verdict for the £55, the balance, although the arbitrator had not in terms vacated the verdict, or reduced the damages, or ascertained any balance as being due from the defendant to the plaintiff(*n*). So also the certificate of a referee respecting an action for work done, "I hereby certify that £74. 7*s*. is a fair and proper sum to be paid by the defendant to the plaintiff," (the defendant having pleaded payment before action of £30, and payment into court of the further sum of £45, and the plaintiff having replied damages ultra,) was held by the court to amount to a verdict for the defendant; as they construed the certificate to mean that the £74. 7*s*. comprehended all that was due from the defendant to the plaintiff (*o*).

Awarding verdict in ejectment.

On the reference of an action of ejectment, if the arbitrator be of opinion that the lessor of the plaintiff is entitled to recover only a portion of the land which he claims, he should take care to confine his award in the plaintiff's favor to that portion, for if under a power to direct a verdict to be entered in an ejectment brought to recover closes A. and B., he award generally that a verdict be entered for the plaintiff, the postea cannot be amended by the court so as to confine the verdict to close A.; although it appear on the face of the award that the arbitrator has decided in the defendant's favor a plea setting up the defendant's title to close B., in an action of trespass brought for that close between the same parties, and referred with the action of ejectment, and the arbitrator

(*m*) Nalder v. Batts, 1 D. & L. 391.

(*n*) Platt v. Hall, 2 M. & W. 700.

(*o*) Salter v. Yeates, 2 M. & W. 67; S. C. 5 Dowl. 291.

in a written paper delivered with the award, states his opinion that the lessor of the plaintiff had no title to close B. (*p*).

Specifying lands by metes and bounds.

If the arbitrator decide that the lessor of the plaintiff is entitled to part of the lands, which he sets out by metes and bounds, he should take care to award the residue to the defendant, or at least to award that the plaintiff has no title to it, or the award will not be final. Omitting all mention of the remainder is not tantamount to finding that the plaintiff has no title to it. It is better, though perhaps not absolutely necessary, to set out the defendant's residue by metes or bounds, or other particular description (*q*).

Awarding verdict subject to opinion of the court.

To what extent an arbitrator is bound to award on points raised in the cause, and how far in general a hypothetical or alternative finding of a verdict subject to the opinion of the court is good, when he is empowered to raise points of law for their consideration, has been treated of in a previous portion of this work (*r*).

Unauthorised award of a verdict bad.

III. *Effect of an unauthorized award of a verdict.*]—Though it was in one case laid down that an unauthorized direction that a verdict should be entered for the plaintiff at a specified sum, amounted to a direction that the defendant should pay that sum to the plaintiff, and as such might be enforced by attachment (*s*); yet on a subsequent occasion it was held not to be equivalent to an order to pay, and an attachment was refused, and the preceding case was expressly overruled, with the concurrence of the judge who decided it (*t*). No action, it seems, will lie on an award containing only such an unauthorized direction to enter a verdict for a certain sum (*u*). The Court of Exchequer, in a recent instance, refused to enforce by attachment, or to set

Not equivalent to a direction to pay.

(*p*) Doe d. Oxenden v. Cropper, 10 A. & E. 197.

(*q*) Doe d. Madkins v. Horner, 8 A. & E. 235.

(*r*) See P. 2, ch. 5, s. 8, d. 5, p. 310.

(*s*) Cartwright v. Blackworth, 1 Dowl. 489.

(*t*) Donlan v. Brett, 2 A. & E. 344.

(*u*) Jackson v. Clarke, M'Lel. & Y. 200; S. C. 13 Price, 208.

aside a similar award, inclining, however, to think an action might be supported, saying that at any rate it was not quite a clear point that the award was void (*x*); but the Court of Queen's Bench have considered the question settled by the decision in *Donlan* v. *Brett* (*y*), and have set the award aside in more instances than one (*z*).

When rejected as surplusage.

Yet if the award contain a sufficient determination of the matters submitted, without looking to the clause directing the entry of a verdict, and that clause can be rejected without altering the sense of the remaining parts of the award, the excess of authority will not vitiate the award, but the faulty direction will be rejected as surplusage. Hence, if the award as to the cause be, that the defendant is not guilty of the grievances laid to his charge, and that a verdict be entered for the defendant, the first part is a sufficient determination of the issue, and the unauthorized direction as to the verdict is simply useless (*a*).

SECTION IV.

OF THE DUTY OF THE ARBITRATOR IN AWARDING DAMAGES.

Arbitrator finding for plaintiff should award damages.

If the arbitrator find for the plaintiff on any portion of the declaration not covered by any plea, on which the issue is found for the defendant, the arbitrator must in general proceed to assess damages for the plaintiff, or the award will not be final. But if the pleas found for the defendant com-

(*x*) Cock v. Gent, 13 M. & W. 364; 3 D. & L. 271.
(*y*) 2 A. & E. 344.
(*z*) Hayward v. Phillips, 6 A. & E. 119; Hawkyard v. Stocks, 2 D. & L. 936.
(*a*) Howett v. Clements, 1 C. B. 128; Hawkyard v. Stocks, 2 D. & L. 936.

pletely answer the plaintiff's claim, it is more proper not to assess any damages on the issues found for the plaintiff (*a*); and if there be an assessment of damages, in such a case the assessment is merely surplusage, and will not affect the right to costs (*b*).

When plea immaterial.

But if the plea, though pleaded to the whole declaration, raise an immaterial defence, so that the plaintiff would be entitled to judgment non obstante veredicto, it is the duty of the arbitrator, according to the Court of Queen's Bench, to assess damages notwithstanding the plea, and the award will be bad if he fail to do so (*c*). The Court of Common Pleas, however, having recently decided that when a cause in which the issues of fact only are joined is referred at Nisi Prius on the usual terms, neither the court nor the arbitrator can direct judgment to be entered non obstante veredicto, practically hold that such an assessment of damages is unnecessary, and cannot benefit the plaintiff (*d*).

Damages on new assignment.

When an action of trespass is taken down to the assizes for the trial of the issues, and also for the assessment of damages on a new assignment, on which the plaintiff has signed judgment for want of a plea, the arbitrator must be careful to assess damages for the plaintiff on the new assignment, however he may determine the issues. If he omit to do so the error will be incurable, and the award may be set aside (*e*).

Contingent damages on demurrer.

So where there are several pleas, on some of which the plaintiff has taken issue, but demurred to others, and the cause, so far as relates to the issues in fact, is referred at the trial, the arbitrator, if he find for the plaintiff, must not omit to assess contingent damages on the demurrer, though

(*a*) Warwick v. Cox, 1 D. & L. 986; Wood v. Duncan, 7 Dowl. 91.

(*b*) Ross v. Clifton, 2 Dowl. N. S. 983; Benett v. Coster, 1 B. & B. 465; S. C. 4 Moore, 110; Savage v. Ashwin, 4 M. & W. 530; Frankum v. Earl of Falmouth, 2 A. & E. 452.

(*c*) Grenfell v. Edgcome, 7 Q. B. 661.

(*d*) Toby v. Lovibond, 12 Jur. 436; S.C. 17 L.J., C.P. 201. See s. 5 of this chapter as to directing an entry of judgment non obstante veredicto, p. 363.

(*e*) Wykes v. Shipton, 8 A. & E. 246.

such course does not seem absolutely necessary, when he determines in the defendant's favor the issue on a plea going to the whole cause of action. In one instance, where neither party requested him to assess contingent damages, but acted as if the matter had not been submitted, the court construed the conduct of the parties to amount to a new parol submission that the arbitrator need not determine the question of contingent damages (*f*).

General damages on all issues.

It is a little inaccurate to assess general damages on all the issues for the plaintiff, where one of the issues found for him is an issue on a plea of set-off, but it is perfectly intelligible and valid, for an award of damages on all the issues means on all on which damages can be assessed (*g*).

One breach damages on several issues.

In an action of covenant, where there is only one breach, directing a verdict to be entered for the plaintiff on each of the two issues raised by the pleas, with separate damages on each, is sufficiently certain as to the damages, as the verdict may be entered for the sum of the two separate amounts; but finding an entire amount of damages on the single breach is the more correct method (*h*).

Damages not to exceed amount taken on the verdict.

The arbitrator cannot direct a verdict to be entered for a sum exceeding the damages taken subject to the reference. His discretion is limited by the amount of damages nominally found by the jury, as the verdict of a jury is limited by those laid in the declaration. And if he direct the entry of a verdict for a larger sum, the award seems to be bad in toto; and the courts have, in one instance, decided that they will not permit a verdict to be entered for an amount reduced to the amount of the specified damages, on the ground that they have nothing to guide their discretion in cutting down the sum awarded (*i*).

Where the cause and all matters in difference were referred, and the Nisi Prius order directed that the verdict should be entered for such sum only (if any) as the arbitra-

(*f*) Cooper v. Langdon, 9 M. & W. 60.

(*g*) Hobdell v. Miller, 6 Bing. N. C. 292.

(*h*) Smith v. Festiniog Railway Company, 4 Bing. N. C. 23.

(*i*) Bonner v. Charlton, 5 East, 139; Prentice v. Reed, 1 Taunt. 151; Taylor v. Shuttleworth, 6 Bing. N. C. 277.

tor should find to be due (not saying in the cause) from the defendant to the plaintiff, the court held that the arbitrator could not award that there was due from the defendant to the plaintiff a larger sum than the amount of the damages taken on the verdict (*k*). From the terms of the above submission, it would seem probable that the verdict was intended to stand as a security for the amount found to be due, whether in respect of matters in the cause or out of it.

No limit of damages as to matters out of cause.

Generally, however, when a cause and all matters in difference are referred at Nisi Prius, the verdict stands as a security only for the damages found due in the cause, and the damages taken on the reference only limit the amount the arbitrator can give in the cause; but there is no limit to the amount the arbitrator may award in respect of the other matters in difference (*l*). The arbitrator, therefore, should assess the damages in the cause separately from those out of it, and take care not to exceed the assigned limit in respect of the former (*m*).

Limiting damages by plaintiff's particulars.

It seems, also, that the amount of damages the arbitrator may award is still further limited by the sum claimed in the plaintiff's particulars of demand, if the defendant bring the particulars before the arbitrator's notice (*n*).

Where it was agreed by the order of reference, that in case the arbitrator should give damages to the plaintiff, the party against whom the action was really brought, though he was not the defendant on the record, should be allowed to retain a certain sum, and the plaintiffs should be paid only the balance; and the award directed that the verdict should be altered to a sum, exceeding the amount of the damages taken by consent, but less than that amount when a deduction for the sum to be retained was made; the court gave their opinion that the judgment which had been entered for the sum awarded, pursuant to the verdict, should be reduced to the sum originally taken by consent, and that

(*k*) Bonner v. Charlton, 5 East, 139.

(*l*) Pearse v. Cameron, 1 M. & S. 675.

(*m*) Taylor v. Shuttleworth, 6 Bing. N. C. 277; Tayler v. Marling, 2 M. & G. 55.

(*n*) Kenrick v. Phillips, 7 M. & W. 415.

Motion to increase damages.

the plaintiff should be entitled to sue out execution for the real balance awarded due to him (*o*). In the above case, as the submission empowered the arbitrator to settle all matters in difference between the parties, and to determine what he should think fit to be done by either of them respecting the matters in dispute, Mansfield, C. J., threw out a suggestion that the arbitrator might have directed that an application should be made to the court to enlarge the verdict to a greater amount of damages, and that the defendant should consent to the enlargement (*p*).

Stipulated debt as damages.

If an action for damages generally be brought on an agreement, which provides that in case of breach the sum of £100 shall be recovered as a stipulated debt binding on each party as to the amount, and not as a penalty, or in the nature of a penalty, and the arbitrator award a less amount to the plaintiff, the award will not be set aside, at least unless the clause was pointed out to the arbitrator's attention, and he was required to act upon it (*q*).

Amount to be awarded in debt.

In an action of debt, if the submission provide that a verdict be entered for the plaintiff with £5 damages, the arbitrator is not limited to awarding £5, but may award the plaintiff the amount in the declaration, for the action being debt not assumpsit, a verdict for the plaintiff means a verdict for the debt mentioned in the declaration, (no amount of debt being specified,) and the damages are in addition, not in exclusion of the debt (*r*).

Amount not specified in debt on bond.

In an action of debt on a money bond, to which the defendant pleaded payment by a co-obligor, the arbitrator directed a verdict to be entered for the plaintiff generally, not mentioning any amount. It was objected to the award that the arbitrator ought to have directed for what sum the verdict should have been entered and execution taken out, but the court held the award sufficient, as it did not appear that there was any question how much was due on the bond, and

(*o*) Prentice v. Reed, 1 Taunt. 151.

(*p*) Prentice v. Reed, 1 Taunt. 156.

(*q*) Pinkerton v. Caslon, 2 B. & A. 704.

(*r*) Annan v. Job, 10 Jur. 1083.

drew a distinction between actions of assumpsit and actions of debt on bonds (*s*). The principle of this decision seems capable of a very general application.

Fixing day of payment.

It seems very questionable, from the report of a late case, whether the arbitrator may appoint any particular day or place for the payment of the damages for which the verdict is to be entered, though if the submission clothe him with the powers of a judge of Nisi Prius he may award speedy execution; but merely fixing a day for the payment earlier than that on which the plaintiff would have been enabled to recover the same in due course of law, does not amount to an award of speedy execution (*t*).

Awarding joint damages to plaintiff and party added.

Where a cause was referred by a judge's order with consent of the parties and of one Cole, and the arbitrator was empowered to direct for whom and for what sum the verdict should be finally entered, and to settle all matters in difference between the parties to the action and between the defendants and Cole, and to determine what he should think fit to be done by either party, and the arbitrator awarded that all further proceedings in the action should cease, that the plaintiff had good cause of action against the defendants in the cause, and was entitled to a verdict therein; and then awarded certain damages "to be paid by the defendants to the plaintiff and Cole, who consented to become a party in the cause;" on an objection being made that under this submission the arbitrator was not entitled to treat Cole as a plaintiff and award damages to him and the original plaintiff jointly, the court refused to grant a rule to order the amount to be paid, considering the sufficiency of the award doubtful (*u*); but an action of debt being afterwards brought on the award by Cole and the plaintiff jointly, the court on demurrer sustained the award as valid, Patteson, J., saying, "It cannot be said the arbitrator has not determined the action, as he gives a verdict for the plaintiff with 40*s*. da-

(*s*) Cayme v. Watts, 3 D. & R. 224.

(*t*) Rees v. Waters, 16 M. & W. 263; S. C. 4 D. & L. 567.

(*u*) Hawkins v. Benton, 2 D. & L. 465.

mages. He might afterwards say that Cole should have a joint interest in those damages" (*x*).

Special damages in ejectment.

Where all matters in difference in an action of ejectment were, after issue joined, referred by a judge's order, which provided "that the costs of the suit, the reference, and award were to abide the event of the award, that if the award should be in favor of the plaintiff he should be at liberty to sign judgment against the defendants in the same manner as if the cause had been tried at Nisi Prius, and to issue a writ or writs of possession thereon, and also to proceed in the usual way for costs on such judgment; and that if the award should be in favor of the defendants they should be at liberty to sign judgment as if the cause had been tried at Nisi Prius," Coleridge, J., intimated a doubt whether the arbitrator could expressly award damages, though he thought that the plaintiff, in signing judgment, might enter it for a shilling damages (*y*).

Cause only referred no award of money to defendant.

All matters in difference in a cause and nothing beyond being referred, the arbitrator has no authority to order the plaintiff to pay the defendant any sum of money (*z*); though when the submission is of the cause and all matters in difference, the arbitrator ought to ascertain the amount of the defendant's claim, and if it exceed the plaintiff's demand, to direct the plaintiff to pay the balance (*a*).

(*x*) Hawkins v. Benton, 15 L. J., Q. B. 139.

(*y*) Doe d. Madkins v. Horner, 8 A. & E. 235.

(*z*) Poyner v. Hatton, 7 M. & W. 211.

(*a*) Maloney v. Stockley, 2 Dowl. N. S. 122; S. C. 4 M. & G. 647; Williams v. Moulsdale, 7 M. & W. 134. See Macarthur v. Campbell, 2 A. & E. 52.

SECTION V.

OF AWARDING AN ENTRY OR ARREST OF JUDGMENT.

PART II. CH. VI. S. 5.

I. *Power to direct entry of judgment.*]—On a reference of a cause, in which there are only issues of fact to be determined, the arbitrator has no implied power to direct judgment to be entered up for either party, even though the submission empower him to direct the entry of a verdict, and to determine what he shall think fit to be done by either of the parties (*a*).

No implied power to direct entry of judgment.

In an action of ejectment the arbitrator awarded as follows:—" I award, order, and determine, that judgment for the plaintiff be entered in the said action with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land,"—describing it. The court entertaining no doubt that in directing judgment to be signed the arbitrator had exceeded his authority, set aside that portion of the award, but refused to set it aside wholly, being of opinion that if all mention of the judgment were struck out there was a sufficient finding of the cause in the plaintiff's favor (*b*).

Unauthorized award of judgment surplusage.

But when the determination of the cause requires that the arbitrator should find upon issues of law as well as of fact, it would seem he may order judgment to be entered on the issues in law (*c*). Thus where, pending a demurrer to one of the pleas, the cause and all matters in difference were referred, and the arbitrator decided the demurrer by directing judgment to be entered thereon for the defendant; on a motion to set aside the award on account of this direction, the court refused the rule, and seemed to think that the parties had,

Award of judgment on a demurrer.

(*a*) Angus v. Redford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735; Allen v. Lowe, 4 Q. B. 66; Toby v. Lovibond, 12 Jur. 436.; S. C. 17 L. J., C. P. 201.

(*b*) Doe d. Body v. Cox, 4 D. & L. 75.

(*c*) Angus v. Redford, 11 M. & W. 69, per Ld. Abinger, p. 74.

by referring the question of law, authorized him to decide as he had done (*d*).

Clause empowering arbitrator to award judgment.

Where the submission respecting several actions authorized the arbitrators "to discontinue or order the determination of the actions, or to make or give any orders, or regulations, or directions, which they shall think proper as to the time and terms of such discontinuance, or any other matter or thing in anywise relating to the said several actions," Coleridge, J., seemed to be of opinion that these powers were large enough to justify the arbitrators in ordering judgment to be entered (*e*).

Whether arbitrator can award judgment non obstante veredicto.

II. *Power to decide on judgment non obstante veredicto.*] —Previous to a very recent decision in the Common Pleas, an arbitrator, acting under an order of Nisi Prius on the usual terms referring a cause and all matters in difference, might have felt himself warranted in supposing that after deciding in favor of the defendant the issue raised on a plea, he was at liberty to entertain a question as to the sufficiency of such a plea, as a defence to the action.

Awarding damages non obstante veredicto.

For though there is no actual decision in the Queen's Bench on the point, the opinion of that court, as gathered from the cases seems to be,—that the arbitrator has authority to decide in effect whether the plaintiff be entitled to judgment non obstante veredicto, and if the question be raised by the pleadings, and brought before the arbitrator by the parties, that the latter ought to decide it in his award, and to assess damages to the plaintiff in case he determines the plea to be insufficient in law to bar the action (*f*).

Thus where the plaintiff declared in case, alleging that he was entitled to the reversion in a close, that a person named Hearn had wrongfully erected incumbrances thereon, and that the defendant wrongfully kept and continued them; and the defendant pleaded not guilty, and secondly, that

(*d*) Mathew v. Davis, 1 Dowl. N. S. 679. 483.

(*e*) Jones v. Powell, 6 Dowl.

(*f*) Allen v. Lowe, 4 Q. B. 66.

PART II. CH. VI. S. 5.

Hearn did not erect the incumbrances; and the arbitrator awarded that the verdict should stand for the plaintiff on the first issue, but without damages, and that the verdict should be entered for the defendant on the second issue; the court expressed an opinion that the award was defective for not giving damages on the first issue for the plaintiff, which the arbitrator, they said, ought to have done, as the issue on the second plea was immaterial, and ought to have been disregarded by him (*g*).

A statement of Patteson, J., in one of the cases just cited, that the Court of Queen's Bench would not set aside an award for not determining a question as to the validity of the pleadings, unless the point as to the plaintiff's right to judgment non obstante veredicto were raised before the arbitrator, assumes that it was the duty of the arbitrator to have decided the question (*h*).

Court not entertain motion for judgment non obstante veredicto.

On motions by plaintiffs for leave to enter judgment non obstante veredicto, after the award made, the courts on several occasions have refused the applications, on the ground that the arbitrator had the same power which the court would have had in the matter, and that his award put an end to the proceeding (*i*).

Where three pleas were pleaded in bar to a declaration in trespass containing only one count, and issues were joined on them, the arbitrator, having directed a verdict for the plaintiff on the two first issues, and for the defendant on the third, added, that if there had not been the third issue he should have awarded a shilling damages to the plaintiff on the other issues, the court held it not competent for the plaintiff to move for judgment non obstante veredicto on the third issue (*k*).

Held in C. P. arbitrator no power to decide

The Court of Common Pleas, however, have recently held, that an arbitrator cannot, without special power, decide on a question as to the plaintiff's right to judgment non obstante

(*g*) Grenfell v. Edgcome, 7 Q. B. 661.

(*h*) Allen v. Lowe, 4 Q. B. 66.

(*i*) See P. 2, ch. 2, s 1, p. 120, as to whether issues in law are referred on the reference of a cause.

(*k*) Steeple v. Bonsall, 4 A. & E. 950; Britt v. Pashley, 16 L. J., Ex. 240; S. C. 1 Ex. R. 64.

as to right to judgment non obstante veredicto.

veredicto, on the ground that the question is not a matter in difference at the time of the reference.

A cause and all matters in difference were referred at Nisi Prius on the usual terms, containing among others, a power to the arbitrator to direct the entry of a verdict, and prohibiting any writ of error being brought. The only issues joined in the cause were issues of fact. On the reference, the plaintiff's counsel contended before the arbitrator that some of the pleas were bad in law, and would be bad non obstante veredicto. This the defendant's counsel admitted, but argued that the arbitrator had no power under the order of reference to consider whether the pleas were bad, or to give judgment non obstante veredicto. The arbitrator, intimating that he thought that he had no such power, but expressing no positive opinion, said he would endeavour to make his award in such a way as to enable the party against whom he decided to raise the point for the opinion of the court.

In his award, after awarding two issues for the plaintiff and the remaining issues for the defendant, he proceeded, "And I do hereby assess the damages of the plaintiff upon the said two several issues which I have ordered to be entered for him at the sum of one shilling, which said sum, except for my finding on the other issues, the plaintiff would be entitled to recover in the said cause."

On a motion to set aside the award, on the grounds, among others, that the arbitrator had not decided on a matter under the order of reference brought before him, viz. whether the plaintiff was entitled to judgment non obstante veredicto; and that the award left it doubtful whether such matter had been awarded on; the Court of Common Pleas held the award to be good, Wilde, C. J., saying, "Was the question about entering judgment non obstante veredicto a matter of difference *at the time of the order of reference?* I am of opinion that it certainly was not, and that no such question could have arisen until the award had been made, and the issues in fact disposed of. That which was presented before the arbitrator, and what he was required to do, was,

what the case of *Angus* v. *Redford* (*l*) shows he had no power to do; for it seems to me that the case of *Angus* v. *Redford* (*m*) is a distinct authority on the point, that the arbitrator could not direct the entry of a judgment non obstante veredicto. The cases concur in this, that neither the court nor the arbitrator has power to enter judgment non obstante veredicto after an order of reference in terms similar to these; and the result, therefore, is, that parties must, in the order of reference, be more distinct as to what they mean to refer. Here the parties have not only empowered the arbitrator to direct mutual releases to be given, but they have also agreed not to bring any writ of error. That is a strong argument to show that the parties never intended that the arbitrator or the court should have the power of controlling the judgment entered up on the award, as such judgment could not afterwards be reviewed by a court in error." The learned judge added the following observations: "Besides, what is there on the face of the award which gives rise to the present objection? Suppose the arbitrator had thought the pleas were good, the frame of the award would have been the same as it is now; and if the arbitrator thought that the judgment non obstante veredicto ought not to be given, must he state so in his award, or is it not enough that he does not direct such judgment to be given? Therefore, although the arbitrator might, during the course of the argument before him, have expressed an opinion against the validity of the pleas, he might afterwards, consistent with this award, have thought that the pleas were good; and there is consequently nothing to show that he did not exercise his judgment thereon" (*n*).

Objection not open on the award.

It is to be noticed that neither *Allen* v. *Lowe* (*o*), nor *Grenfell* v. *Edgcome* (*p*), were cited before the court in this case.

Raising point as to the right on face of award.

An arbitrator who was bound to state points of law at the request of either party, was requested to raise on the face of

(*l*) 11 M. & W. 69.
(*m*) 11 M. & W. 69.
(*n*) Toby v. Lovibond, 12 Jur. 436; S. C. 17 L. J., C. P. 201.
(*o*) 4 Q. B. 66.
(*p*) 7 Q. B. 661.

his award the question as to the validity of a custom set forth in a plea, and if the custom were bad, whether the plaintiff was not entitled to judgment non obstante veredicto; the award was held sufficiently final, which raised the points for the opinion of the court, though the arbitrator did not express any positive determination of his own respecting them (*q*).

No power to award arrest of judgment.

III. *Power to direct arrest of judgment.*]—As an arbitrator cannot direct judgment to be entered, so is it equally beyond his authority to direct the judgment to be arrested, even though on the reference an objection is taken to the validity of the declaration, and he is requested to direct an arrest of the judgment in the cause (*r*).

SECTION VI.

OF AWARDING ON A SUIT IN EQUITY.

Dismissing suit final.

An award that a suit in Chancery shall be dismissed is a sufficiently final determination of the suit, for it intends a substantial dismissal and a perpetual cessation of the suit, and is a conclusive decision on the rights of the parties with respect to all matters which are the subject of the suit (*a*). Where a Chancery suit, in which the plaintiffs prayed to be decreed entitled to a sum of money which the defendant claimed as a gift, was referred with all matters in difference, the award ordering the bill to be dismissed, and each party

(*q*) Bradbee v. Christ's Hospital, 4 M. & G. 714.

(*r*) Angus v. Redford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735.

(*a*) Knight v. Burton, 1 Salk. 75.

PART II. CH. VI. S. 6.

to pay his own costs, was held to be a sufficient decision of the suit, and also of the title of the defendant to the sum of money, the subject of it (*b*).

Determining subject of suit.

If on the reference of a suit in equity to rescind an agreement, it be referred to the arbitrator to determine whether the agreement should be rescinded and the suit put an end to, and the arbitrator award that the agreement shall be rescinded, and that each party shall pay his own costs, this, it seems, is a sufficient determination of the suit (*c*).

Duty of arbitrator when only as the master.

When an arbitrator is appointed by an order of Chancery made in a suit to take the accounts as the master, he being merely substituted for the master, should make an award like a master's report, and it will be open to similar exceptions. It will not, therefore, it is apprehended, be sufficient for him to state a general balance only, but he ought, it seems, like the master, to set forth a schedule of the items of the separate accounts, showing which he allows and which he disallows, and to state a balance of each account (*d*).

(*b*) Pearse v. Pearse, 9 B. & C. 484.

(*c*) Tribe & Upperton, In re, 3 A. & E. 295.

(*d*) Dick v. Milligan, 2 Ves. Jr. 23; 4 Bro. C. C. 117, 536.

CHAPTER VII.

THE DUTY OF THE ARBITRATOR IN AWARDING AS TO COSTS.

Scope and contents of the seventh chapter.

As the question of costs necessarily arises on every reference, it has been thought fit to devote a separate chapter to the consideration of the duty of the arbitrator in respect of costs under the various forms of submissions.

The first section points out what power he has over costs, and how he may exercise it, and the effect of awarding payment of the costs of the cause.

The second section considers what are the arbitrator's powers and duty, when costs abide the event of the award; and examines what event of the award is meant in respective instances, whether the separate event of the award as to a particular matter, or the general event of the whole award.

Section three shows the convenience of giving the arbitrator power to certify for costs, and specifies the proper mode of executing such a power.

SECTION I.

OF THE ARBITRATOR'S POWER AND DUTY IN AWARDING COSTS.

PART II. CH. VII. s. 1.

1. *What are costs of the cause, reference, and award.*]—

What costs are costs in the cause.

It may be of use to note the distinction between costs of the cause, costs of the reference, and costs of the award.

When an award, and not merely a certificate, is to be made, the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the cause, if any, after the award (*a*); but they do not include the expense of witnesses to prove the issues on the reference.

What costs of the reference.

The expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of the reference, as, for instance, the costs of a brief in the cause referred prepared after the reference for the purposes of the arbitration. This is the case even if the arbitrator expressly find that there are no matters in difference except in the cause (*b*). But if the arbitrator be to make a *certificate*, as he is merely substituted for the jury out of court, and there is no award, and nothing but the verdict, all the costs of arriving at that verdict, which therefore necessarily include the costs of the proceedings before the arbitrator, are costs in the cause (*c*).

What costs of award.

The costs of the award are the amount of the arbitrator's charges, which are usually paid to him when the award is taken up. As between the parties, if the arbitrator's demand be excessive, the costs of the award are such amount only as on taxation the Master deems the arbitrator entitled to have claimed (*d*). In general the Master passes the arbitrator's charges without question, especially if he be a barris-

(*a*) Ex relatione of a Master. See Goodall v. Ray, 4 Dowl. 1.

(*b*) Brown v. Nelson, 13 M. & W. 397; Utting v. Evans, M'Lel. 12.

(*c*) Brown v. Nelson, 13 M. & W. 397; Mackintosh v. Blyth, 1 Bing. 269.

(*d*) Brazier v. Bryant, 2 Dowl. 600.

ter. Even in the case of a lay arbitrator, the practice in the Court of Queen's Bench is not to review the charges without a judge's order giving the Master liberty to do so (*d*).

When costs of reference costs of cause.

Under some circumstances the costs of the reference have been considered costs in the cause, even when there has been an award made. A plaintiff who had recovered a verdict in trover, with large damages, consented to take back the goods in reduction of the damages, upon its being referred to an arbitrator, by order of Nisi Prius, to ascertain the amount of deterioration, if any, which amount, with the costs of the cause, were to be paid to the plaintiff. The order of Nisi Prius was silent as to the costs of the reference. The arbitrator made a formal award, finding the amount of the deterioration, and awarded a sum accordingly, but said nothing about costs. The court held, that under the peculiar circumstances of the case, the whole proceedings being for the ease of the defendant, the costs of the reference were costs in the cause to which the plaintiff was entitled (*e*).

Costs of showing cause, against rule to set aside award.

The costs of showing cause against a rule for setting aside an award in a cause, are costs in the cause, and the party who ultimately has the verdict in his favour is entitled to have them taxed for him: even where the award states a case and the court reduce the damages (*f*). But where, after a rule for setting aside an inquisition before the sheriff for excessive damages, the question of amount was referred, nothing being said about the costs of the application, the arbitrator having by his award reduced the damages, it was held that the plaintiff was not entitled to the costs of showing cause (*g*).

Arbitrator has implied power over costs of cause.

II. *The power of the arbitrator over costs.*]—When a cause alone, or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate

(*d*) Ex relatione of a Master of the Court of Queen's Bench.

(*e*) Tregoning v. Attenborough, 7 Bing. 733; Taylor v. Lady Gordon, 9 Bing. 570.

(*f*) Goodall v. Ray, 4 Dowl. 1; Clarke v. Owen, 2 H. & W. 324.

(*g*) Lewis v. Harris, 2 B. & C. 620.

PART II. CH. VII. S. 1.

respecting the costs of the cause, but not of the reference or award (*h*): and each party must bear his own expenses of the reference, and is liable to half the costs of the award (*i*).

But not of the reference or award.

On a reference of a cause and all matters in difference, if there be an express clause giving the arbitrator power over costs, and there appear nothing in the context to limit the generality of the power, the costs of the reference and award, as well as of the cause, seem to be submitted to his award (*k*).

Power over costs includes costs of cause and reference.

A reference, among other things, concerning all costs, charges, and expenses, incident to an indictment for assault, and the subsequent proceedings thereon, gives the arbitrator power to award costs in respect of the previous as well as subsequent proceedings in the indictment, for the expression, incident to the indictment, includes the cost of previous as well as subsequent proceedings, as, for instance, the costs of going before the grand jury (*l*).

Costs of indictment.

In references under the Lands Clauses Consolidation Act, 1845, of disputes respecting the compensation to be paid for lands taken for the purposes of an undertaking authorized by statute, by s. 34, "all the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions" (*m*).

Costs under the Lands Clauses Act.

In references under the Railways Clauses Consolidation

Costs under the Railways Clauses Act.

(*h*) Firth v. Robinson, 1 B. & C. 277; Taylor v. Lady Gordon, 9 Bing. 570; Strutt v. Rogers, 7 Taunt. 214; Stratton v. Green, 8 Bing. 437; Candler v. Fuller, Willes, 62; Roe d. Wood v. Doe, 2 T. R. 644; Bracher v. Cotton, Barnes, 123; Hartnell v. Hill, Forrest, 73; Massey v. Hall, Rolle, Ab. Arb. K. 14; Carpenter v. Joynes, Pract. Reg. 45, contrâ.

(*i*) Taylor v. Lady Gordon, 9 Bing. 570; Grove v. Cox, 1 Taunt. 165; Bell v. Benson, 2 Chitt. 157; 2 Tidd. 6th Ed. 874, 9th Ed. 831.

(*k*) Strutt v. Rogers, 7 Taunt. 214; Wood v. O'Kelly, 9 East, 436; See R. v. Moate, 3 B. & Ad. 237; Bradley v. Tunstow, 1 B & P. 34.

(*l*) Baker v. Townsend, 7 Taunt. 422.

(*m*) See R. v. J. J. York, 1 A. & E. 828, as to what costs are costs of inquiry. See also ss. 51, 52, of the Lands Clauses Act.

Act, 1845 (*m*), by s. 135, "Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators, shall be in the discretion of the arbitrators."

Costs under the Companies Clauses Act.

The Companies Clauses Consolidation Act, 1845 (*n*), has in s. 133 a similar enactment, verbatim, adding, however, the words, "or their umpires, as the case may be."

III. *Duty of the arbitrator in awarding costs.*]—In general, when the costs of the cause or of the reference are in the arbitrator's discretion, he need not, unless he please, give any directions respecting them. The result, if the award be silent on the question of costs, is, that the costs of the cause follow the verdict; and the plaintiff is entitled to them, if the verdict awarded be in his favor, even although the award as to the other matters in difference directs the plaintiff to pay the defendant a large sum (*o*).

Award silent as to costs.

Costs of cause follow verdict.

Costs of reference and award, how borne.

The costs of the reference and award, it is apprehended, stand on the same footing when an arbitrator does not choose to exercise his power over them, as when he has no such power, so that each party, as we have seen, will have to bear his own costs of the reference, and pay half those of the award (*p*).

When the costs are in the discretion of the arbitrator, "who *shall* ascertain the same," it would seem, from some observations on the effect of that provision, that the arbitrator is bound to give some costs, and to fix their amount (*q*).

Fixing amount of costs in award.

When the arbitrator thinks fit to exercise his power over the costs, his discretion is subject to few limitations. He

(*m*) 8 & 9 Vict. c. 20. See the Appendix of Statutes.

(*n*) 8 & 9 Vict. c. 16. See the Appendix of Statutes.

(*o*) Young v. Gye, 10 Moore, 198; Mackintosh v. Blyth, 1 Bing. 269.

(*p*) See ante, p. 372.

(*q*) Morgan v. Smith. 1 Dowl. N. S. 617; S. C. 9 M. & W. 427; Angus v. Retford, 2 Dowl. N. S. 735 S. C. 11 M. & W. 69, per Parke, B.; Grenfell v. Edgcome, 7 Q. B. 661, per Williams, J.

may (if the submission make no provision for the costs being taxed) award a gross sum to be paid for costs, and the court will not review his discretion as to the amount, unless the sum be so excessive as to afford evidence of partiality (*r*). Instead of ascertaining the amount himself, (if the reference be of a cause in one of the superior courts, or under a submission which can be made a rule of court,) he may award that one of the parties shall pay to the other costs to be taxed by the Master (*s*), or costs generally, without saying who is to ascertain the amount, in which case the officer of the court will tax them (*t*). But if the submission provide that the costs of the reference and award are to be in the discretion of the arbitrator, "*who shall ascertain the same*," and he order a party to pay the costs, the award is bad, unless he ascertains their amount himself in the award, and the Master's taxation will not supply the omission (*u*).

Special clause, arbitrator to fix amount.

If the cause referred be in an inferior court, as there is no authorized officer to tax the costs of such a court recognized by the superior courts, the arbitrator must take care to assess them himself, or the award will be deficient (*x*). So also if the reference be by agreement, which contains no provision for making it a rule of court, so that the court has no jurisdiction over the matter, the Master cannot tax the costs of the reference; and therefore the arbitrator, if he give them, must fix the sum in the award (*y*).

Cause in inferior court.

Reference out of court.

When he has power over the costs, he may apportion them as he pleases; he may order either the plaintiff or the defendant to pay the whole amount of them, or that each shall pay in certain proportions (*z*). He may direct an

Arbitrator may apportion costs.

(*r*) Shephard v. Brand, Cas. temp. Hardw. 53; S. C. 2 Barnard. 463; Anon. 1 Chitt. 38; Turner v. Rose, 1 Ld. Kenyon, 393.

(*s*) Winter v. Garlick, 6 Mod. 195; S. C. 1 Salk. 75; Pedley v. Goddard, 7 T. R. 73; Pratt v. Salt, Cas. temp. Hardw. 161; Tidd's Pract. 832, 9th Ed.

(*t*) Browne v. Marsden, 1 H. Bl. 223; Stokes v. Lewis, 2 Smith 12; Dudley v. Nettlefold, 2 Stra. 737; Thorp v. Cole, 4 Dowl. 457; Stephenson v. Browning, Barnes, 56.

(*u*) Morgan v. Smith, 1 Dowl. N. S. 617.

(*x*) Addison v. Gray, 2 Wils. 293; Fox v. Smith, 2 Wils. 267.

(*y*) Thorp v. Cole, 4 Dowl. 457.

(*z*) Cargey v. Aitcheson, 2 B. & C. 170.

infant party to the reference, or a person who though not a party to any cause referred, has made himself a party to the reference, to pay the whole costs (*a*).

Costs as between attorney and client.

But he cannot, unless specially authorized, award any other than common costs, as between party and party; he has no implied power to order the costs either of the cause or reference to be taxed as between attorney and client (*b*). In one instance, however, where the reference was by agreement out of court, and the arbitrator awarded a certain sum for costs in the cause, stated to be the amount of costs as between attorney and client; the court thought such costs might reasonably be given, and refused to interfere with that provision in the award (*c*).

Costs of special jury.

It was held, on an order of reference, by which the costs of the cause were to abide the event, and the costs of the reference and of the special jury, which had been obtained on the motion of the defendant, were left in the arbitrator's discretion, that the arbitrator had only power of allowing the costs of the special jury, as costs in the cause, if the party who moved for the same had succeeded, and that the arbitrator had exceeded his authority, after directing a verdict for the plaintiff, in ordering him to pay the costs of the special jury (*d*).

Setting off costs in cross actions.

When two actions are included in one submission, the arbitrator cannot order the costs of one to be set off against the costs and damages in the other, so as to affect the lien of the attornies. The set-off must be subject to the lien (*e*).

Who to get the costs taxed.

If the arbitrator direct the defendant, on a specified day, to pay the plaintiff his costs to be taxed by the Master, it

(*a*) Proudfoot v. Poile, 3 D. & L. 524.

(*b*) Pratt v. Salt, Cas. Temp. Hardw. 161; Bartle v. Musgrave, 1 Dowl. N. S. 325: Broadhurst v. Darlington, 2 Dowl. 38; Turner v. Rose, 1 Ld. Kenyon, 393; Marder v. Cox, Cowp. 127; Seckham v. Babb, 8 Dowl. 167; Whitehead v. Firth, 12 East, 166; Browne v. Marsden, 1 H. Bl. 223.

(*c*) Hartnell v. Hill, Forrest. 73.

(*d*) Finlayson v. M'Leod, 1 B. & A. 663.

(*e*) Cowell v. Bettely, 10 Bing. 432; Figes v. Adams. 4 Taunt. 632; Caddel v. Smart, 4 Dowl. 760; Reg. Gen. H. T. 2 W. IV. 93, 3 B. & Ad. 388.

is no excuse for non-payment by the day, that the plaintiff has not had them taxed, for it is incumbent on the defendant to procure them to be taxed in time, so that he may ascertain the amount, and have the money ready for the plaintiff according to the award (*f*).

Arbitrator awarding fee to himself.

Though the costs of the reference and award are left in the arbitrator's discretion, and we have seen that he may, if he please, ascertain in his award the amount of the costs of the reference, yet he is not in general permitted to award to himself any definite sum, by way of fee or compensation for his trouble, though such a course is sometimes incorrectly pursued (*g*). Still less is he authorized to award a definite sum to be paid into his hands, including in it an indefinite allowance to himself (*h*). If he fix in the award the amount of the costs of the award, that portion of the award, if objected to, will, when the court has jurisdiction, be set aside; for it is contrary to reason to allow an arbitrator to be judge in his own cause, and without control to determine the amount of what is to be paid to himself. He should simply direct which party is to pay the costs of the award, without naming any sum in his award, and the officer of the court who taxes the costs, will determine as between the parties the proper amount to be allowed for the arbitrator's fees and charges (*i*). But if the arbitrator be by the submission specially directed to ascertain the amount of the costs of the award, he should do so in the award (*k*); and if the reference be one over which the courts have no jurisdiction, so that the costs cannot be taxed by the taxing officer, it would seem, if he has power to give costs of the award, he must, in order properly to exercise it, fix the

(*f*) Candler v. Fuller, Willes, 62; Bigland v. Skelton, 12 East, 436.

(*g*) Seccombe v. Babb, 6 M. & W. 129; Daubuz v. Rickman, 4 Dowl. 129; Kendrick v. Davies, 5 Dowl. 693.

(*h*) Robinson v. Henderson, 6 M. & S. 276.

(*i*) George v. Louseley, 8 East, 12; Miller v. Robe, 3 Taunt. 461; Fitzgerald v. Graves, 5 Taunt. 341; Barrett v. Parry, 4 Taunt. 657; Brazier v. Bryant, 2 Dowl. 600; Moore v. Darley, 1 C. B. 445. See ante, p. 371.

(*k*) Morgan v. Smith, 1 Dowl. N. S. 617; Gillon v. Mersey and Clyde Navigation Company, 3 B. & Ad. 493.

amount himself, lest the award be defective for want of certainty.

Costs of cause awarded same as on a verdict.

IV. *Effect of awarding payment of the costs of the cause.*] —When an arbitrator, having authority, directs one party to pay the other the costs of the cause, this direction, unless the context prevent it, will generally be understood to give a right to such costs, and such only, as the party would in the ordinary course of law have been entitled to, had the event of the cause been determined as it was, by the court or a jury instead of by the arbitrator. Thus after a verdict for the defendant, and a rule for a new trial obtained, the cause being referred, an award that the plaintiffs were entitled to recover, and that the defendants should pay the costs of the cause, was held not to entitle the plaintiffs to the costs of the first trial, for they would not have had a right to them had the cause been tried a second time, and a verdict found in their favor (*l*). So where the arbitrator was to hear and decide on the costs of the cause, as if a plea which had been withdrawn by consent had remained, and the arbitrator, after finding two issues for the plaintiff, and one which went to the whole merits for the defendants, directed the plaintiff to pay the defendants their costs in the cause, the court held that the plaintiff was entitled to the costs of the two issues found for him, and the defendants to the costs of the third; and that as nothing was said in the award respecting the costs of the issue on the plea which had been withdrawn, the arbitrator was not to be considered as having included them in the costs of the cause, or meant to give them to either party, consequently that each party would have to bear his own costs of that issue (*m*).

Award of costs in action.

An award to the plaintiff of "the costs sustained in the action," does not give him the costs of the reference (*n*).

(*l*) Rigby v. Okell, 7 B. & C. 57.
(*m*) Allenby v. Proudlock, 4 A. & E. 326.
(*n*) Browne v. Marsden, 1 H. Bl. 223.

PART II. CH. VII. S. 1.

As cases decided on the construction of a direction in the submission to pay costs, illustrate what would be the effect of similar words in an award, the two following cases are cited here.

Not include costs of reference.

By a judge's order referring a cause, the plaintiff was to be at liberty to enter up judgment and sue out execution for the sum awarded due, together with his costs; it was decided by the Court of Common Pleas, in accordance with what was reported to be the practice of the King's Bench, that this submission did not entitle the plaintiff to the costs of the reference (*o*).

Costs of special jury.

Where an indictment, removed into the King's Bench by the defendant, and made a special jury cause by the prosecutor, was referred by an order of reference, which stated that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled to costs, the defendant agreed to pay the costs, and the arbitrator did so find; it was held that the prosecutor could not recover the costs of the special jury, since the judge had not certified pursuant to 6 G. IV. c. 50, s. 34, and the order of reference did not expressly give a power of doing so to the arbitrator, and that the general term "costs," in this order, did not include those of the reference and award (*p*).

(*o*) Bradley v. Tunstow, 1 B. & P. 34.

(*p*) R. v. Moate, 3 B. & Ad. 237.

SECTION II.

OF THE POWER AND DUTY OF THE ARBITRATOR WHEN COSTS ABIDE THE EVENT.

Costs abide event.

1. *Power of the arbitrator when costs abide the event.*]— Instead of leaving the costs in the discretion of the arbitrator, the submission often provides *that they shall abide the event.*

"The costs," costs of cause and reference.

If the submission provide that "*the costs*" are to abide the event of the award, that includes the costs both of the reference and of the cause (*a*).

Arbitrator no power on costs abiding event.

When costs are to abide the event, the arbitrator has no control over them, and the award should be silent respecting them. It is an excess of authority on his part to ascertain their amount in the award (*b*), or to order the costs of the cause to be set off against the other party's damages and costs in another action (*c*), or to direct that they shall be paid at any particular time or place (*d*).

Awarding speedy execution.

Sometimes, however, he has an indirect power of affecting them. For it would seem from the observations of Parke, B., in a recent case, that when the arbitrator has all the powers of a judge of Nisi Prius, he may award speedy execution of the costs and damages in the cause, and thus compel an earlier payment than the ordinary course of law would impose (*e*).

Awarding injunction.

In another instance, a cause and all matters in difference, including a suit in equity by the defendants in law against the plaintiffs in law, praying for an injunction to restrain the plaintiffs in law from proceeding in the action, were re-

(*a*) Wood O'Kelly, 9 East, 436.
(*b*) Kendrick v. Davies, 5 Dowl. 693; Hemsworth v. Brian, 1 C. B. 131.
(*c*) Unsted v. Kidd, 1 Chitt. 526.
(*d*) Cockburn v. Newton, 9 Dowl. 676; Clarke v. Owen, 2 H. & W. 324.
(*e*) Rees v. Waters, 16 M. & W. 263; S. C. 4 D. & L. 567.

ferred, and the costs of the action, and of the suit in equity, were directed to abide the event of the award.

On some of the issues in the action, the arbitrator found for the plaintiffs with damages, but as to so much of the suit in equity as regarded them, he awarded that the plaintiffs should be restrained, and should not proceed to recover the damages found for them, nor costs.

This clause was complained of as an unauthorized interference with the costs of the cause, which it was contended were to follow the event of the cause. But the court were of opinion that the arbitrator had not exceeded his authority, as the event of the award, which the costs were to abide, meant the ultimate and general event, and not that of each particular part, and that as the suit in equity prayed an injunction, the arbitrator clearly had power to restrain on equitable grounds the plaintiffs from recovering that to which on legal grounds they were entitled, although it was true that he thus exercised an indirect jurisdiction over the costs at law (*f*).

What the event of the award.

II. *What the event, when the costs of the cause only abide the event.*]—From the somewhat ambiguous provision ordinarily inserted in a submission, referring a cause and all matters in difference, "that the costs of the cause shall abide the event of the award," it is not always easy to say on what event the costs of the cause are to depend, whether on the event of the award as to the cause, or on the general event of the whole award.

Costs of cause abiding event of cause.

If the costs of the cause are to abide the event of the award, and the submission is silent as to the costs of the reference, or leaves them in the arbitrator's discretion, the event construed to be meant, will be the event of the award as to the cause, and not the general event of the award, even although the event of the whole award be in favor of the party who fails in the action (*g*).

(*f*) Reeves v. Macgregor, 9 A. & E. 576.

(*g*) Lund v. Hudson, 1 D. & L. 236; Crosbie v. Holmes, 3 D. & L.

The arbitrator, therefore, in such case, is not justified in making a general award, but he must decide the cause separately from the other matters in difference, in order that there may be an event of the cause on which the costs of the cause can be taxed. And for this end it is necessary that the cause should not merely be disposed of, but determined in favor of one of the parties (*h*). The proper manner of deciding the cause, the duty of finding on every issue joined, the powers and duties of the arbitrator as to the verdict, damages, and judgment, have been fully discussed in the previous chapter (*i*).

Arbitrator must decide cause separately.

An award of a gross sum in favor of either party is insufficient, because it leaves quite uncertain in whose favor the cause has been decided, since it is impossible to collect from it whether the sum is to be paid in respect of the action, or of any other matters in difference, so that there is no determination of the event on which the costs of the cause depend (*k*); and even if when a verdict has been taken, the issues are specifically decided, the finding is still defective, because as there are no specific damages in the cause, the costs of the cause cannot be taxed on the verdict (*l*).

Separate damages in cause.

To allow taxing costs on the verdict.

And the arbitrator should assess the true amount of debt or damages in the cause separately, for in trespass and case the right to costs may often depend upon the damages amounting to forty shillings (*m*). And in assumpsit debt and covenant, for a demand in the nature of a debt, the scale at which the costs are taxed depends upon whether the plaintiff recovers a sum exceeding £20 (*n*).

To determine right to costs.

And scale of taxation.

Possibly, however, the award, if defective in this respect, may in many cases be sustained, if the plaintiff desire it,

Waiving right to costs.

566; Highgate Archway Company v. Nash, 2 B. & A. 597; Pearson v. Archbold, 11 M. & W. 477.

(*h*) Leaming v. Fearnley, In re, 5 B. & Ad. 403.

(*i*) P. 2, ch. 6, p. 336

(*k*) Pearson v. Archbold, 11 M. & W. 477; Crosbie v. Holmes, 3 D. & L. 566; S. C. 15 L. J. Q. B. 125.

(*l*) Taylor v. Shuttleworth, 8 Dowl. 281; Tayler c. Marling, 2 M. & G. 55.

(*m*) Spain v. Cadell, 8 M. & W. 129.

(*n*) Elleman v. Williams, 2 D. & L. 46; See P. 3, ch. 8. s. 2, as to taxing the costs of the cause; See also Rule v. Bryde, 1 Ex. R. 151.

by his consenting to waive his right to costs on the higher scale, or at all events by his waiving it as to all costs, so that the defendant cannot be injured by the omission of the arbitrator to distinguish between the damages in and out of the action (*o*).

Costs of cause and reference abiding event.

III. *What the event, when the costs of cause and reference abide the event.*]—When on a reference of a cause and all matters in difference, the submission provides that the costs of the cause and of the reference are to abide the event of the award, that, as a general rule, it is said, (though some cases hold differently,) will be construed to mean the general event of the award, and that each party will have to pay his own costs, unless everything be decided in favor of one party (*p*).

No costs, award finding part for each.

Hence, where the costs of the action, submission, reference, and award, and all other matters in anywise relating thereto, were directed to abide the event of the award, and to be paid at such time or times as the arbitrator should direct, and the award found some matters in favor of each party, the arbitrator was held to have exceeded his authority in giving any directions respecting the payment of the costs (*q*).

Costs following balance.

Supposing there are several accounts between two merchants, and they agree that the whole accounts shall be referred to an arbitrator, the costs to abide the result of the award, and the arbitrator finds the balance upon some of the accounts in favor of one party, and upon others in favor of the other, but the final balance of the whole amount in favor of one of the two, the result on which the right to costs depends means the final determination of the whole matters in dispute, and the costs follow the balance: and this it seems is the case, although an action has been com-

(*o*) Morgan v. Smith, 1 Dowl. N. S. 617; England v. Davison, 9 Dowl. 1052; Taylor v. Shuttleworth, 8 Dowl. 281; Tayler v. Marling, 2 M. & G. 55.

(*p*) Boodle v. Davies, 3 A. & E. 200; Jones v. Powell, 6 Dowl. 483.

(*q*) Boodle v. Davies, 3 A. & E. 200.

menced in respect of some of the matters in account, and the cause and all matters in difference have been referred, the costs of the cause, reference, and award, to abide the result of the award, and the arbitrator has determined that in the action the plaintiff is entitled to recover a certain amount, but that on the balance of all the accounts, taking into consideration the sum found due in the action, the plaintiff is indebted to the defendant (*r*).

When costs follow general event, whether arbitrator need decide cause.

Where an action of trover for corn was referred, the costs to abide the event of the award, and the arbitrator awarded to the plaintiff a right of entering into the defendant's barn, but did not decide the action, it was held that as the event was substantially in the plaintiff's favor, the plaintiff was entitled to his costs, and the court noticed the distinction that the costs were to abide the event "*of the award*," and not "*of the action*" (*s*).

Awarding action to cease.

When the costs of the suit, reference, and award, are to abide the event of the award, and, independently of the cause, the award is partly in favor of the plaintiff, and partly of the defendant, as the event of the award as to costs has been already determined by this finding to be, that each party shall pay his own, it is not incumbent on the arbitrator to make a legal termination of the cause in favor of either party. On this ground, where an action for the price of some flints sold and delivered, and also for the use and occupation of a gravel-pit, was referred, with all matters in difference, the costs of the suit, reference, and award, being to abide the event of the award, the court supported the award, which directed the defendant to deliver a certain quantity of flints to the plaintiff, and the plaintiff to pay the defendant a specified sum, upon payment of which the award ordered that all proceedings in the action should cease, and that each party should give the other a general release, the arbitrator expressing no opinion respecting the merits of the action (*t*).

Costs of

But although it may not be absolutely necessary, it is

(*r*) Hemsworth v. Brian, 1 C. B. 131.

(*s*) Anon. 1 Smith, 426.

(*t*) Yates v. Knight, 2 Bing. N. C. 277.

PART II. CH. VII. S. 2.

Cause abiding event of cause.

advisable in all cases, if possible, to decide on the merits of the cause separately, for in some cases where the costs of the cause, and of the reference and award, were to abide the event of the award, the court have construed the submission to mean that the costs of the cause were to depend on the event of the award as to the cause (*u*); and in one instance, when the cause was decided for the defendant, and the general event of the reference was for the plaintiff, directed the Master to tax the defendant his costs of suit, and gave the plaintiff the costs of the reference (*x*).

Costs of causes abiding event of each.

From the peculiar terms of the submission, and the nature of the subject-matter, the direction that costs are to abide the event of the award, has been in particular cases construed to mean that the costs of each matter are to abide the decision on that matter. An action of replevin, and two actions of ejectment were referred, together with the subject-matters thereof, in one submission, and it was also agreed "that the costs of the said several actions, and of all matters and things relating thereto, shall abide the event of the award, and be borne and paid by the parties at such time and in such manner as the same shall be thereby ordered to be paid, and that the costs and charges of the submission, reference, and award, shall be in the discretion of the arbitrators." The arbitrators found two actions in favor of one party, and one in favor of the other, and then directed the costs of each action severally to be paid by the losing party in each on a particular day. It was objected that the arbitrators had no power over the costs, as the event of the award was not wholly one way; but the court held the arbitrators right in their direction, as in substance several actions, and nothing more, being referred, the agreement that the costs of the actions should abide the event of the award, meant the event of the award as to each action distributively (*y*).

Costs of cause and

But where an action and a suit to restrain the plaintiff at

(*u*) Eardley v. Steer, 2 C. M. & R. 327.

(*x*) Chittenden v. Walker, 3 A. & E. 691.

(*y*) Jones v. Powell, 6 Dowl. 483.

law from proceeding with the action were referred, the costs of the action and suit to abide the event of the award, the court held that the event which the costs were to abide, meant the ultimate and general event, and not that of each particular part (*z*).

suit abiding general event.

IV. *Effect of the award when costs abide the event.*]— When the costs of the cause are to abide the event of the award, the costs which are allowed are generally those costs only which would have followed the legal event, had the conclusion arrived at by the award been obtained in the ordinary course of law.

Award same effect as a verdict.

Thus, on a reference taking place after a verdict for the plaintiff and a rule for a new trial, the costs of the cause to abide the event, the arbitrator found for the defendant on all the issues; it was held, that as, if there had been a second trial, neither party would have been entitled to the costs of the first trial, the finding of the arbitrator gave the defendant no claim to those costs (*a*). So where the costs of a cause referred were to abide the event, and the arbitrator awarded that there was not anything due to the plaintiffs, it was held, that as the plaintiffs were suing as executors, they were not liable to pay costs to the defendant, as they would not have been liable had the cause been so decided by the verdict of a jury (*b*). So also where on a similar reference the arbitrator awarded that the plaintiff's demand was thirty-seven shillings only, a sum under forty shillings, the court made absolute a rule referring it to the Master to tax the defendant his costs of the action, since if a jury had arrived at a like result, they would have permitted a suggestion to have been entered to entitle the defendant to costs (*c*).

Costs of first trial.

Costs of executors plaintiffs.

Damages under forty shillings.

Where, however, "all matters in difference in the cause"

Costs not following legal event.

(*z*) Reeves v. Macgregor, 9 A. & E. 576.

(*a*) Thomas v. Hawkes, 1 Dowl. N. S. 346; Summers v. Formby, 1 B. & C. 100.

(*b*) Highnam v. Hassell, cited in Swinglehurst v. Altham, 3 T. R. 138.

(*c*) Butler v. Grubb, cited in Swinglehurst v. Altham, 3 T. R. 138.

in an action on the case to try a right to a watercourse were, after issue joined, referred by a judge's order, the costs of the cause to abide the event of the award, but no power was given to the arbitrator to certify under the statute 3 & 4 Vic. c. 24, s. 2, and the arbitrator found for the plaintiff on all the issues, with sixpence damages, Coleridge, J., remarking that the above-mentioned statute did not apply in terms, as the plaintiff did not recover his damages by the verdict of a jury, held the plaintiff entitled to full costs, construing the submission to mean that the payment of costs should follow the event of the award, namely, that he in whose favor the decision was, should be paid by the other party the costs of the suit (*d*).

When defendant arrested for too large sum.

A determination of a cause by an arbitrator, where a verdict has been taken subject to the reference, has often been held equivalent to a trial, so as to entitle the defendant to costs under the 43 G. III. c. 46, s. 3, where the plaintiff does not recover the sum for which the defendant was arrested, and the arrest was made without reasonable and probable cause (*e*). Nor is he precluded from applying, on the ground of other matters in difference being referred by the same submission, if the arbitrator have made a separate adjudication as to the cause (*f*). But if a cause be referred before trial, the costs to abide the event, and there is no award of a verdict, the defendant is not entitled to costs under the 43 G. III. c. 46, s. 3, the sum awarded the plaintiff not being money recovered in the action within the meaning of the statute (*g*), even when, by the submission, the costs are to abide the event in like manner as on a verdict (*h*).

Where a cause and all matters in difference were referred, the costs of the cause to abide the event of the award, and

(*d*) Griffiths v. Thomas, 15 L. J. Q. B. 336; S. C. 4 D. & L. 109.

(*e*) Summers v. Grosvenor, 2 C. & M. 341; Summers v. Formby, 1 B. & C. 100; Silversides v. Bowley, 1 Moore, 92; Rowe v. Rhodes, 2 C. & M. 379; Reynolds v. Flower, 3 M. & Sc. 801; Payne v. Acton, 1 B. & B. 278; Watkins v. O'Gorman Mahon, 5 Dowl. 178.

(*f*) Jones v. Jehu, 5 Dowl. 130.

(*g*) Keene v. Deeble, 3 B. & C. 491.

(*h*) Holder v. Raitt, 2 A. & E. 445.

the arbitrator found that at the commencement of the suit there was due from the defendant to the plaintiff £45, and that the plaintiff had no reasonable or probable cause for arresting the defendant (as he had done) for £179, and that the defendant by means thereof, was entitled to compensation to the amount of £20; the court, in the exercise of their discretion, refused to allow the defendant costs under the 43 G. III. c. 46, inasmuch as by the terms of the submission the costs were to abide the event of the award, and that was in favor of the plaintiff (*i*).

Affidavit of debt for too much.

In a recent case, the question was raised, but not decided, whether the 5 & 6 Vic. c. 122, s. 19, which provides for giving costs to the defendant when the plaintiff shall not recover the amount of the sum for which he has filed an affidavit of debt, and it appears to the court that he had no reasonable or probable cause for making the affidavit for the amount, applied to causes determined by awards (*k*).

Double costs in replevin.

Where a replevin suit not at issue was referred, the costs to abide the event, and the arbitrator awarded in favor of the defendant, it was held that the defendant was not entitled to double costs under the statute 11 Geo. II. c. 19, s. 22, as that act gives double costs against a plaintiff in replevin only in three cases, namely, where he is nonsuited, discontinues his action, or has judgment given against him; though had the arbitrator awarded a discontinuance it would perhaps have been different (*l*).

Costs in action for not setting out tithes.

An action to recover the treble value of tithes not set out under 2 & 3 Edw. VI. c. 13, having been referred after demurrer, and the arbitrator having awarded the single value to be less than £6. 13*s.* 4*d.*, the plaintiff was held not entitled to costs on the counts for the penalty under the stat. 8 & 9 W. III. c. 11, s. 5, the value not having been found by the jury (*m*); but full costs were given where there was a verdict taken subject to the reference, and the arbitrator directed a verdict to be entered for the treble value,

(*i*) Thompson v. Atkinson, 6 B. & C. 193; See also Turner v. Prince, 2 M. & P. 305.

(*k*) Higginson v. Broadhurst, 1 D. & L. 490.

(*l*) Gurney v. Buller, 1 B. & A. 670.

(*m*) Barnard v. Moss, 1 H. Bl. 107.

£1: 10*s.* (*n*). An award of less than £5, on the reference of a cause within the jurisdiction of the London Court of Requests, deprives the plaintiff of his right to costs (*o*), although there is no verdict (*p*).

Depriving of costs.

Costs of compensation inquiry.

Where a party claiming compensation under a railway act, agreed to refer his claim to arbitration, instead of taking the verdict of a jury under the provisions of the Act, and the deed of reference and the award were silent about costs, the party was not held entitled, on account of an award in his favor, to claim the costs of the reference from the company, although had a jury given him by their verdict a similar amount of compensation, he would, according to the statute, have been entitled to the costs of summoning the jury, the expenses of a bond which the party was bound to execute, and the expenses of witnesses (*q*).

SECTION III.

OF THE DUTY OF THE ARBITRATOR WHEN EMPOWERED TO CERTIFY FOR COSTS.

Power to certify for costs should be given.

By special provisions inserted in orders of reference the arbitrator is frequently authorized as a judge of Nisi Prius to grant various certificates affecting the right to costs or the amount of costs.

Hardship when not given.

Care should be taken to see that such provisions are inserted in the submission, for cases of hardship often arise, when the submission does not give the arbitrator such

(*n*) Pedley v. Frampton, 2 Chitt. 155.

(*o*) 39 & 40 Geo. III. c. 104, s. 12. Local Act.

(*p*) Day v. Mearns, 2 Chitt. 157. See Holden v. Newman, 13 East, 160.

(*q*) Reynal, Ex parte, 16 L. J., Q. B. 304.

power. In an action of trespass referred, the costs to abide the event, the arbitrator awarded five shillings damages for an assault by the defendant in attempting to exercise a right of way negatived by the arbitrator: the court held the event meant the legal event, and that under the stat. 22 & 23, Charles II, c. 9, the plaintiff could recover no more costs than damages, as the arbitrator's award was not tantamount to a judge's certificate under that Act, and such certificate was necessary to entitle the plaintiff to full costs (*a*). Even where the arbitrator giving ten shillings damages for a trespass, awarded in terms that the trespass was wilful, the court held they could not give the plaintiff his full costs of suit, though they regretted that provision for supplying the want of the judge's certificate had not been made in the submission (*b*). So where an indictment removed by the defendant into the Queen's Bench, and made a special jury cause at the instance of the prosecutors, was on the trial referred, and the order of reference provided that if the arbitrator were of opinion that the defendant was guilty and the prosecutors entitled to costs, the defendant agreed to pay the costs, and the arbitrator did so find; the court held that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs pursuant to the 6 Geo. IV. c. 50, s. 34, and the order of reference gave no such power expressly to the arbitrator (*c*).

Certifying cause fit to be tried before a judge.

In many cases an express clause is very properly inserted in the submission empowering the arbitrator to certify that the cause was a fit one to be tried before a judge of the superior courts, so that if the plaintiff recover less than £20 he may have his costs taxed for him on the higher scale if the arbitrator think fit to grant a certificate (*d*).

Judge may certify at any time.

If the submission omit such a provision, the arbitrator's certificate will not be of any force of itself, but if the cause were referred at Nisi Prius it may form the ground of an application to the judge before whom the cause was brought

(*a*) Swinglehurst v. Altham, 3 T. R. 138; Willis v. Osborne, 1 Chitt. 183.

(*b*) Ward v. Mallinder, 5 East, 489.

(*c*) R. v. Moate, 3 B. & Ad. 237. See Finlayson v. M'Leod, 1 B. & A. 663.

(*d*) Hallen v. Smith, 7 Dowl. 394.

on for trial, who in the exercise of his discretion would, probably, under the circumstances, grant a certificate to the same effect (*e*); for this certificate may be granted by the judge at any time (*f*), though it cannot be made by the court after the judge's death (*g*).

Power transferred from judge to arbitrator.

If the arbitrator have a power to certify, and omit to exercise it, the judge before whom the cause came on for trial cannot, it seems, grant a certificate, his power being transferred by the submission to the arbitrator (*h*).

Arbitrator must certify in award for costs of special jury.

Although the statute 6 Geo. IV. c. 50, s. 34, provides that the judge shall immediately after the verdict certify *on the back of the record* that the cause was proper to be tried by a special jury, the arbitrator, when clothed by the submission with the same powers as the judge of Nisi Prius, must embody his certificate in his award, for as soon as he has once awarded his power is at an end; so that if, after making his award, he indorse on the back of the record a certificate that the cause was proper to be tried by a special jury, such certificate is of no avail to entitle the successful party to the costs of the special jury (*i*).

Certifying no distinct matter of complaint on each count.

After an application to a judge to strike out the first or second counts in the declaration, as founded on the same subject-matter, had been dismissed, (the judge being satisfied that a distinct claim was intended to be made under each,) the cause was referred. The arbitrator who was empowered to certify for a special jury and to certify as a judge of Nisi Prius might have done "that no distinct subject matter of complaint was bonâ fide intended to be established in respect of each count," awarded for the plaintiff on the second count, and for the defendant on the first and third counts, and certified "that the cause was fit to be tried by a special jury;" and also "that no distinct subject matter of complaint was bonâ fide intended to be established in respect of *either of the counts on which the plaintiff had failed.*" The court

(*e*) Nokes v. Frazer, 3 Dowl. 339; Broggref v. Hawke, 6 Dowl. 67.

(*f*) Ivey v. Young, 5 Dowl. 450.

(*g*) Astley v. Joy, 9 A. & E. 702.

(*h*) Richardson v. Kensitt, 6 M. & G. 712.

(*i*) Geeve v. Gorton, 3 D. & L. 481. See Spain v. Cadell, 8 M. & W. 129, post.

held this latter certificate ineffectual to deprive the plaintiff of his costs of the cause, as it did not show with sufficient clearness that the subject matter of the second count was not distinct from that of the first, which was the question before the judge. Had the latter certificate been valid, the plaintiff, though losing the costs of the cause, would not, it seems, have been deprived of the costs of the special jury (*k*).

Certifying action brought to try a right.

When the submission gives the arbitrator power "to certify for the purpose of costs in the same manner as a judge at Nisi Prius," he has authority, if he award a verdict for the plaintiff for nominal damages, to certify, under the 3 & 4 Vict. c. 24, s. 2, that the action was brought to try a right other than the mere right to damages (*l*). He has the same power which a judge has under the statute, and the exercise of his discretion is open to review only when that of a judge of Nisi Prius could be questioned; his discretion, therefore, in granting or refusing the certificate, where the action may have been brought to try a right, is, it seems, quite unfettered (*m*). Where the arbitrator thinks fit to certify, it is not necessary that he should state in his award what right the action is brought to try (*n*).

Arbitrator must certify in the award.

In giving the certificate, the arbitrator, in all substantial matters, should follow the rules laid down in the statute for the guidance of the judge. Yet although the statute enacts that "if the plaintiff in any action of trespass or trespass on the case shall recover by the verdict of a jury less damages than 40*s*., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, unless the judge or presiding officer before whom such verdict shall be obtained shall *immediately afterwards* certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right," &c; as it is impossible that the arbitrator

(*k*) Dewar v. Swabey, 11 A. & E. 913.

(*l*) Spain v. Cadell, 8 M. & W. 129; S. C. 9 Dowl. 745.

(*m*) Bury v. Dunn, 1 D. & L. 141.

(*n*) Angus v. Redford, 2 Dowl. N. S. 735; S. C. 11 M. & W. 69.

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can follow these provisions literally, it is sufficient if he do so cy près by inserting his certificate in his award; for he may not make his award at one time and certify as to the costs at another (*o*).

(*o*) Spain v. Cadell, 8 M. & W. 129; S. C. 9 Dowl. 745. See Geeve v. Gorton, 3 D. & L. 481, ante. p. 390.

CHAPTER VIII.

WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD.

Scope and contents of the eighth chapter.

AFTER deciding the matters in difference, and framing his award upon them according to the principles and rules laid down in the three preceding chapters, the arbitrator will often feel, that his award is but an unsatisfactory decision in his own mind, and does incomplete justice, unless he be at liberty to add some further provisions respecting the conduct of the parties, or the disposal of the property, concerning which the inquiry has taken place. Yet the fear of exceeding his authority, and of thereby vitiating his award, may frequently restrain him from inserting a most beneficial regulation. On the other hand, numerous instances have been already cited in this work, of arbitrators assuming a power not entrusted to them with fatal effect on their whole decision. It therefore becomes a point of great importance to consider what directions an arbitrator is justified in giving in his award.

An attempt, in consequence, is made in this chapter to extract, as far as may be, from recorded cases an exposition of the powers which belong to the arbitrator under circumstances of ordinary occurrence, and of the best method of carrying those powers into execution. It is true that the

directions which may be given must vary infinitely with the special nature of each reference, and the peculiar terms of respective submissions; but the principles to be deduced from the cases cited in the succeeding pages will, it is hoped, throw a useful light in cases of difficulty.

In the first section it is endeavoured to classify under separate divisions the principal directions which the arbitrator may give in his award by virtue of the implied powers vested in him on a general reference. This includes a consideration of the nature of the satisfaction which he may appoint; the extent of his power in directing payment of money or interest; the modes in which he may deal with the joint interests of contending partners; his right to order one party to indemnify the other against particular contingencies; and how he should prescribe respecting the giving releases, and the execution of conveyances.

The second section treats of the provision very frequently inserted in submissions, empowering the arbitrator to say what shall be done by the parties respecting the matters in dispute; and illustrates the proper mode of awarding pursuant to it, by examples both of valid and invalid directions under it.

It has been thought useful to collect in the next section some observations on the duties of arbitrators or commissioners in making allotment or partition of lands, which usually takes place under the powers of an Act of Parliament.

The fourth section examines into the effect of directions in the award, which affect other than the parties to the submission; showing when a direction to pay money to a stranger, or an order on a stranger to do an act, is valid; and the consequences of laying down regulations in the award, which impose on a party the necessity of intermeddling with a stranger's property.

SECTION I.

OF DIRECTIONS UNDER THE GENERAL POWERS OF THE ARBITRATOR.

1. *What kind of satisfaction may be directed.*]—An arbitrator cannot bind a man's liberty or right to real property when only personal things are submitted to his decision; and therefore, if he award that one party shall serve the other for a certain number of years (*a*), or order a release of the right to lands (*b*), in satisfaction for a trespass, this will be void, for nobody can be supposed to submit more than his personal estate to answer a personal injury, for that only might be taken in execution for it at common law.

Arbitrator has no implied power over person or land.

Over personal estate only.

On this principle, it seems that an arbitrator who has to ascertain what sum is due for advances by a trustee to his cestui que trust has no implied power to give the trustee a lien on the lands of the latter, or to direct them to be sold to pay the amount awarded (*c*).

No power to award lien on land.

An award that two shall intermarry is a void award, for marriage ought to depend upon the parties' choice; and the bodies of the parties are not submitted to the power of the arbitrator (*d*).

No power to award marriage.

It is, however, necessarily implied in the submission that satisfaction is to be given out of the parties' personal estate, for this is necessary for quieting the differences between the parties. The arbitrator, therefore, is justified in awarding as a satisfaction a sum of money, and, it is said in some cases, other chattels, as a horse or a quart of wine (*e*). But according to other authorities, he cannot award a chattel

Whether arbitrator may award satisfaction other than money.

Awarding chattel.

(*a*) Rolle, Ab. Arb. B. 12, p. 243.

(*b*) Rolle, Ab. Arb. B. 13, p. 243.

(*c*) Coppard, Ex parte, 4 Deac. & Ch. 102.

(*d*) Bac. Ab. Arb. E. 3; Rolle, Ab. Arb. I. 10, p. 252.

(*e*) Bac. Ab. Arb. E. Purslow v. Baily, 2 Ld. Raym. 1039; S. C. 1 Salk. 76; 6 Mod. 221.

other than money, (which is the measure of all things,) by way of damages, unless there be a controversy between the parties respecting the chattel (*f*).

Awarding defendant to keep plaintiff's goods.

On one occasion, however, an action having been brought for the non-delivery of some goods shipped on board the defendants' vessel, the arbitrator, who was empowered finally to settle the differences between the parties, after awarding compensation to the plaintiff for the non-delivery, was held authorized in directing that the defendants might keep the goods which he found to be in their possession (*g*). It is to be observed, that here the arbitrator was "finally to settle the differences." Such a provision, it is apprehended, gave him more than the ordinary powers in awarding satisfaction.

Bond to be delivered up.

In an old authority it is laid down that on a reference of all controversies to the time of the submission, the award may direct one of the parties, by way of satisfaction, to deliver up an obligation made since the submission (*h*).

Awarding begging pardon.

So it may be gathered that an arbitrator may award as a satisfaction that one party shall beg the other's pardon, but that the award will be uncertain if he leave the injured party to determine on the time and place where he is to receive this satisfaction, for time and place are most important ingredients in such sort of satisfaction (*i*). In an old case, two out of three justices were of opinion that an award was good which directed the defendant to make submission before the Mayor of Taunton for slanderous words spoken of the plaintiff (*k*).

When special directions good.

Unless there be some clause empowering the arbitrator to say what shall be done, or unless the very nature of the question require it, the arbitrator is rarely allowed to give any particular directions respecting the property in dispute.

(*f*) Rolle, Ab. Arb. B. 10, 11, p. 243; Hemsworth v. Brian, 1 C. B. 131.

(*g*) Gillon v. Mersey Navigation Company, In re, 3 B. & Ad. 493. See Hemsworth v. Brian, 1 C. B. 131; Baillie v. Edinburgh Oil Gas Company, 3 C. & F. 639.

(*h*) Bac. Ab. Arb. E.; Rolle, Ab. Arb. B. 10, p. 243.

(*i*) Glover v. Barrie, 1 Salk. 71.

(*k*) Spigurnell v. Jene, 1 Sid. 12.

Ordering replacement of fixtures.

Thus, on a general reference, where the question was whether some fixtures which the landlord had removed were part of the premises demised to the tenant, it was decided that the arbitrator had no authority to order the fixtures to be replaced by the tenant, and the expense of replacing them to be repaid him by the landlord (*l*).

To take disputed title with all faults.

Where the dispute was respecting the goodness of the title of an estate agreed to be purchased, the arbitrator was not held justified in ordering in effect that the purchaser should take the title with all faults, and that the seller should execute a bond indemnifying him against eviction (*m*).

Awarding power of distress.

In like manner, on a reference of all matters in difference between a landlord and a tenant, where there were differences respecting a distress which had been put in, and as to the amount of rent which ought to be paid; the court decided that the arbitrator had no implied authority to give the landlord a power to distrain for the rent newly fixed by him, which power the landlord did not possess as to the rent originally created by the demise: and they held that the arbitrator's authority to give such a power ought either to appear by the express terms of the reference, or that it ought to be brought within the general words of the submission, by the fact that the question as to the power of distress was one of the matters in difference between the parties; they remarked, also, that there was scarcely any conceivable addition to the landlord's powers which an arbitrator might not give, unless he was held to be restrained by these two considerations, and that a power to enter for non-payment of rent or non-performance of covenants might be given by the same authority as a power to distrain. It is to be noticed in this case, that there was a clause in the submission empowering the arbitrator to order what he should think fit to be done by the parties respecting the matters referred, but it was not adverted to in the argument or judgment (*n*).

Matter in difference

The above case, which lays down the rule that the arbi-

(*l*) Price v. Popkin, 10 A. & E. 139.

(*m*) Ross v. Boards, 8 A. & E. 290.

(*n*) Pascoe v. Pascoe, 3 Bing. N. C. 898.

requiring special decision.

trator has power to give directions, however unusual, which are necessary to decide the very question in dispute, may be illustrated further. A party who supplied the British army in the Peninsula with provisions brought an action against his agent, the principal object of which was to procure the agent to verify certain vouchers, without which the accounts of the plaintiff could not be passed. On a reference being proposed, Gibbs, C. J., expressed a clear opinion that it would be within the jurisdiction of the arbitrator to direct that the agent should go before the commissary and verify the vouchers in question (*o*).

Compelling party to verify vouchers.

Regulating future payment of tithes.

Where the question in difference is respecting the mode in which things are to be done in future, the arbitrator will in some cases have power to regulate the future enjoyment of property, although there be no clause authorizing him to say what shall be done. Thus, if there be a dispute between the parson of a parish and the parishioners whether the tithes shall be paid in kind or not, the arbitrator has power to award that a parishioner shall in future pay the parson a certain yearly sum in lieu of tithes, for the right to the tithes is the question in dispute (*p*).

Ordering indentures of apprenticeship to be cancelled.

On a reference of all matters in difference between a master and apprentice, the arbitrator may order the indentures of apprenticeship to be delivered up (*q*); but he has no power to order them to be cancelled when the submission is between the father and the master of the apprentice, and the latter is no party to the reference, although it be brought under the notice of the arbitrator as a matter in difference (*r*).

Directing illegal act to be done.

An arbitrator may not award an act to be done contrary to law (*s*). An award directing a party to commit a crime, as to kill, or steal, or forge a deed, would be clearly void (*t*).

(*o*) Atkyns v. Baldwin, 1 Stark. 209.

(*p*) Beckingham v. Hunter, Rolle, Ab. Arb. D. 8, p. 246.

(*q*) Bac. Ab. Arb. E.

(*r*) Wicks v. Cox, 11 Jur. 542. See P. 2, ch. 8. s. 1, d. 4, as to ordering dissolution of partnership.

(*s*) Bac. Ab. Arb. E. 4.

(*t*) Co. Litt. 206; Wood v. Griffith, 1 Swanst. 55. Bac. Ab. Arb. E. 4.

If an arbitrator order a party to do anything which will make him a trespasser the direction is invalid (*u*).

II. *Directions as to payment of money.*]—An arbitrator should direct payment of the amount he finds to be due from one party to the other; for if he do not, the party liable for the amount cannot be compelled in a court of law by attachment to pay it, as his not doing so is no disobedience of the award, and consequently no contempt of court (*x*). Arbitrator should direct payment.

The omission, however, will not render the award invalid, and it seems, when the suit referred is in Chancery, that that court would probably make an order to enforce payment of the balance found due; even if that could not be done, the validity of the award will not be affected by the nature of the remedy to which the parties are left in order to enforce obedience, provided there be some sufficient remedy (*y*), as there generally, if not always, is by action (*z*).

An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit (*a*). May fix time and place of payment.

It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the future day (*b*). Awarding promissory note.

So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time (*c*). Money bond.

He may direct payment to be made by instalments (*d*). Payment by instalments.

He may add, that if the sum

(*u*) Bac. Ab. Arb. E. 4; Turner v. Swainson, 1 M. & W. 572. See post, s. 4, of this chapter.

(*x*) Edgell v. Dallimore, 11 Moore, 541; Hopkins v. Davies, 1 C. M. & R. 846; S. C. 3 Dowl. 508; Priddell v. Sutton, 5 Bing. 200.

(*y*) Wilkinson v. Page, 1 Hare, 276.

(*z*) Hopkins v. Davies, 1 C. M. & R. 846; Edgell v. Dallimore, 11 Moore, 541.

(*a*) Morphett, In re, 2 D. & L. 967; Freeman v. Bernard, 1 Salk. 69; Anon. 1 Keb. 92; S. C. 2 Brownl. 309.

(*b*) Booth v. Garnett, 2 Str. 1082.

(*c*) Coke v. Whorwood, 2 Saund. 337; S. C. 2 Lev. 6; Brown v. Watson, 6 Bing. N. C. 118.

(*d*) Kockill v. Witherell, 2 Keb. 838.

awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue, the whole amount shall be payable at once (*e*).

Penalty for non-payment at the time specified.

It is no objection to the award that the day on which the arbitrator directs payment to be made happens to be a Sunday (*f*).

Payment on Sunday.

In some cases, however, the arbitrator should not specify any time of payment.

Fixing time for paying purchase price.

When he has merely to fix the purchase price of property, he has no right to direct the payment of the amount he awards as the price to be made at a future day, for delay in payment may affect the value of the compensation (*g*). We have previously seen that when a verdict is taken subject to a reference, it is very questionable whether an arbitrator may appoint a day or place of payment of the damages for which he directs a verdict to be entered for the plaintiff (*h*).

Or damages in action.

Ordering payment of rent not due.

An award made on the 23rd of June, ordering one of the parties to pay to the other so much for rent, which by the award itself appeared not to be due until the 24th of June, is void, for the rent may become extinct by eviction or surrender before it be due (*i*).

Extent of power to direct payment.

The following is an instructive case respecting the extent of the arbitrator's power in directing payment.

Executors, who under a will were to pay the interest of a sum of money annually to the testator's son for his life, had, out of other trust funds, advanced him considerable sums at different times. He had not paid them interest on the advances, nor had they paid him the interest on the legacy, for many years. On a reference of all matters in difference, and of anything in anywise relating thereto, the court held

(*e*) Royston v. Rydall, Rolle, Ab. Arb. H. 8, p. 250; Com. Dig. Arb. E. 15; Kockill v. Witherell, 2 Keb. 838. See P. 2, ch. 5, s. 4, d. 9, p. 270, as to alternative award.

(*f*) Hobdell v. Miller, 6 Bing. N. C. 292.

(*g*) Emery v. Wase, 8 Ves. 504, a.

(*h*) Rees v. Waters, 16 M. & W. 263; S. C. 4 D. & L. 567. See P. 2, ch. 6, s. 4, p. 360.

(*i*) Barnardiston v. Fowler, 10 Mod. 204. See Gray v. Wicker, Rolle, Ab. Arb. B. 3, p. 242; C. 8, p. 245.

that the utmost limit of the arbitrator's power was to ascertain the respective principal sums due from the son, and whether they were to carry any and what interest, and from what period; to ascertain the principal sum to the interest of which he was entitled; for how many years his claim to that interest was to be carried back; and at what rate; and whether he was entitled to consider each year's interest withheld as a principal loan bearing interest to be set off against that which he was to pay; that having ascertained all these particulars up to the date of the submission, their duty was to direct the payment by him of the balance forthwith, or at a future time or times. The court decided, also, that the arbitrators had no right to deal with the accounts beyond the date of the submission, or to regulate the future dealings of the parties with regard to them, as there was no clause in the submission empowering them to do so; that consequently, in calculating the accounts up to the quarter-day beyond the date of the submission, and in making the payment by the executors of the future interest on the legacy due to the son indefinitely during his whole life dependent on his paying off at specified times the principal and interest of the balance found due from him to them, the arbitrators had clearly exceeded their powers (*k*).

Party dying directing executor to pay.

If the submission contain the usual clause providing against the death of a party revoking the authority of the arbitrator, and a party die pending the reference, against whom the arbitrator finds a balance, it seems a proper course to award that such a sum is due from the deceased, and to direct his personal representatives to pay the amount out of his assets. Simply directing the executors to pay the sum out of the assets is sufficient (*l*).

Directing payment on reference by executor.

On a general reference by an executor respecting differences between the testator and the other party, if the arbitrator come to a conclusion that the testator is liable to

(*k*) Morphett, In re, 2 D. & L. 967.

(*l*) Dowse v. Coxe, 3 Bing. 20; Lewin v. Holbrook, 2 Dowl. N. S. 991.

Directing executor to pay.

the other in a certain sum, and no question have been raised on the reference as to any want of assets to satisfy the demand, the arbitrator may direct the executor to pay the amount. Such a direction, it is true, will preclude the executor from alleging a deficiency of assets in any proceedings to enforce the award, but as on such a reference the question of assets is impliedly referred, and the executor does not then allege any want of assets, which he ought to do if he intended to rely on such a defence, the reasonable presumption is, that the estate is sufficient (*m*).

Awarding testator indebted.

Merely awarding that the testator's estate is indebted in a certain sum seems to be a sufficient award.

Directing executor to pay out of assets quando, &c.

Directing the executor to pay the amount "out of the assets which may be in his hands, or which may come to them," does not prevent the executor from showing that he has no funds of the testator to pay the sum awarded, as such a finding leaves the question of assets open. This form of award may seem to be the fairer mode of adjudicating, and has never been expressly held to be improper, but has even been enforced by attachment on proof of assets (*n*). It can hardly, however, be pronounced quite safe under an ordinary submission from the objection that the award is not final, for leaving undetermined a matter held to be referred, namely, the question of the sufficiency of the assets (*o*).

To pay out of assets.

Whether ordering the executor to pay "*out of the assets*," concludes him from saying he has none, and so amounts, in fact, to a simple order to pay, or whether, as Abbott, C. J., was inclined to think, it leaves the point untouched, has never formally been decided (*p*).

Directing payment by assignees of bankrupt.

If a party by mistake pay to the assignees of a bankrupt a larger sum than he owes to the bankrupt's estate, the arbitrator is empowered to award that the assignees shall repay the whole excess, and is not bound as to that amount to treat the party paying as a creditor of the bankrupt

(*m*) See P. 1, ch. 2, s. 2, d. 4, p. 36.

(*n*) Joseph & Webster, In re, 1 Russ. & M. 496.

(*o*) Love v. Honeybourne, 4 D. & R. 814.

(*p*) Love v. Honeybourne, 4 D. & R. 814.

only entitled to share rateably with the other creditors (*p*).

Directing payment to wife instead of husband and wife.

An arbitrator is sometimes justified in directing payment to be made to one of several joint parties. A rent charge devised to a married woman, (but not for her sole and separate use,) being in arrear, a distress was put in by her, and an action of replevin was brought against her and her husband, the husband, though unwillingly, being compelled to allow his name to be used in the action. On the trial at Nisi Prius, a verdict having been taken for the plaintiff, and the cause and all matters in relation to the annuity in question in the cause having been referred, the arbitrator, among other things, awarded a verdict for the defendants, and directed the plaintiff to pay the arrears of the annuity to the female defendant. On a motion to set aside the award on the ground, among others, that the arbitrator ought to have directed the arrears to be paid to the two defendants, and not to the female defendant only, the court held that the arbitrator was justified in the direction he gave, (the facts of the case showing that the husband was acting in collusion with the plaintiff to deprive his wife of the annuity,) and ultimately granted an attachment against the plaintiff for not paying the arrears to the wife, although it was sworn that he had already paid them to the husband (*q*).

Right to interest question of fact.

III. *Directions as to payment of interest.*]—The right to interest is a question of fact, of which the arbitrator is the sole judge; there is no rule of law on the subject; consequently an award is not to be impeached for allowing compound interest, since that may be due by contract between the parties, either express or to be inferred from the nature of their dealings (*r*).

Allowing

Interest may be allowed by an arbitrator in cases where

(*p*) Malcolm v. Fullarton, 2 T. R. 645.

(*q*) Wynne v. Wynne, 4 M. & G. 253; S. C. 9 Dowl. 396, 901.

(*r*) Morgan v. Mather, 2 Ves. Jr. 15; Morphett, In re, 2 D. & L. 967. See ante, p. 401.

interest contrary to practice of court.

the court will not give it, as, for instance, in taking the accounts in a suit he may allow interest on both sides of the account, although the courts will not do so; for allowing it is a breach of a mere regulation of practice, and not a violation of any general rule of law, and the authority to adjust the account carries with it an implied authority to allow interest (*t*).

When substituted for the jury, an arbitrator, it is presumed, is at liberty to award interest, as they might under the stat. 3 & 4 W. IV. c. 42, ss. 28, 29.

An arbitrator may award to a purchaser of an estate, who has brought an action against the vendor for not completing the sale, the amount of interest paid by the former upon money borrowed by him to complete the purchase, and necessarily kept idle pending an endeavour of the vendor to clear the title, and the court will presume that the arbitrator was justified by the circumstances in making the allowance, nothing to the contrary appearing on the face of the award (*u*).

Power to award dissolution of partnership.

IV. *Directions in cases of partnership.*]—On a reference of all matters in difference between partners, the arbitrator may award a dissolution of the partnership, if the question whether the partnership shall be dissolved be a matter in difference (*x*). But he is not bound to direct a dissolution, although he be appointed "to arbitrate and determine as well a dissolution of the said co-partnership and a remuneration to either party, and the cancelling of the indenture of co-partnership, as of and concerning all matters in difference between the parties" (*y*).

Awarding on the debts and credits of a firm.

In winding up the affairs of a partnership, the arbitrator, if there be any dispute as to amounts, should in general take an account as between the partners, of the outstanding debts due from the firm, and also of the debts due to the

(*t*) Badger In re, 2 B. & A. 691. 474; Bac. Ab. Arb. E.
(*u*) Sherry v. Oke, 3 Dowl. 349.
(*x*) Green v. Waring, 1 W. Bl. 548.
(*y*) Simmonds v. Swaine, 1 Taunt.

firm. It may be convenient sometimes to set forth in the award, or in a schedule appended to it, lists of the creditors and debtors of the firm, with the respective amounts of the claims or liabilities of each individual, and the court will presume the list full and correct, until the contrary be expressly proved (*z*).

Awarding partners to pay and receive in moieties.

The arbitrator may direct that the partners shall pay the debts of the firm, and be entitled to receive the amounts due to it in such proportions as he shall think just. Where there are two partners only, it is not uncommon to award that each shall pay and receive a moiety, and to provide that if one advance or pay any sum beyond the half share due from him, the other shall reimburse him the amount overpaid. In like manner he may direct that if any sum due to the firm be paid to one partner, he shall pay the moiety of it to the other partner. There is no necessity for any more specific directions how the several sums are to be received and paid. Directing a division in equal shares of the amounts due to the firm is clearly all he can prescribe effectually, since he has no control over the debtors, who, if they please, can pay the whole they owe to one of the partners (*a*).

Not specifying amounts.

If there be no dispute respecting the amount of the debts and credits, the general direction to pay and receive them in moieties is sufficient, without ascertaining the amount in the award; and when the specific amounts are not stated, the court will presume there was no contention on this head (*b*).

Awarding all debts and credits to one partner.

It seems an unobjectionable course, instead of awarding a division as above, to direct that one of the parties shall pay all the liabilities of the firm, and collect for his own use all the money owing to it, and to allow in the ultimate account a specified sum for or against the other partner, according to the balance of advantage or loss calculated to accrue to the former (*c*).

(*z*) Lingood v. Eade, 2 Atk. 501.

(*a*) Wood v. Wilson, 2 C. M. & R. 241; Lingood v. Eade, 2 Atk. 501.

(*b*) Wood v. Wilson, 2 C. M. & R. 241.

(*c*) Coppard, Ex parte, 4 Deac. & Ch. 103.

Appointing a receiver.

Appointing a third party as a receiver to collect and pay over the sums according to the arbitrator's directions, would no doubt in many cases be a very convenient way of settling matters, but without a special provision in the submission the arbitrator cannot make such an appointment (*d*). Supposing the arbitrator empowered, and desiring to adopt the above course, it is recommended, in order to effectuate the object, that he should direct the partners to join in giving the person appointed a power of attorney to collect the debts (*e*). Care should be taken in the submission to exonerate the arbitrator from all liability respecting the application of the money, because otherwise, if the person deputed become insolvent, it is said to be doubtful whether the arbitrator himself may not in some instances be liable (*f*).

Awarding on the partnership stock.

Whatever may be the power which the arbitrator, from the nature of the differences, or the terms of the submission, will in general have to apportion the partnership stock and effects between the members, or to give the whole to one, making him pay a compensation to the rest for their shares, still if the submission recite that there are disputes touching the division of the partnership lands and effects, and give the arbitrator power to direct a division of them, and contain an agreement that each of the two parties will execute to the other conveyances according to such division, the arbitrator ought to make some division, and is not, it seems, justified in making one partner purchase the share of the other in the premises. Yet in an instance where the arbitrator had so awarded, the court held the award good on its face, as they said they would presume, till the negative were shown, that there had been some arrangement before the arbitrator, by which one of the parties was ultimately to become possessor of the whole property (*g*).

Dividing it between partners.

Making no provision for defi-

An award as between partners, providing for the application of the partnership assets, if there should be a surplus,

(*d*) Mackay, In re, 2 A. & E. 356.
(*e*) Lingood v. Eade, 2 Atk. 501.
(*f*) Lingood v. Eade, 2 Atk. 501; See, however, Anon. 12 Mod. 560.
(*g*) Wood v. Wilson, 2 C. M. & R. 241.

but not providing for the event of a deficiency, is not necessarily invalid; for as the arbitrators proceed on a supposition that the partnership effects are sufficient, the court, in support of the award, will presume the supposition well founded, unless the contrary be shown, and will intend that the state of the assets is such as to render any provision for the case of a deficiency unnecessary (*h*).

Deficiency of assets.

A wide discretion is given to the arbitrator when he is to settle the terms on which a partnership is to be dissolved.

Settling terms of dissolution of partnership.

An arbitrator who was to decide the terms upon which an agreement of partnership between two attorneys should be cancelled, and also which of the parties had a right to receive certain bills of costs, after deciding that one of them was entitled to receive the bills of costs, and collect and keep the amount for his own use, was held authorized to award further that that one should be at liberty to use the name of the other, either alone, or jointly with his own, in suing for the same; Tindal, C. J., being of opinion that imposing on the arbitrator the duty of deciding which of the parties had a right to receive the bills of costs, gave him impliedly the authority to order suits for the purpose of recovering those costs; and also that the power to settle the terms on which the agreement of partnership was to be cancelled, included the power of directing actions to be brought; and that although the partner, whose name was to be used, might possibly be made liable for the costs of such actions, it was not incumbent on the arbitrator to award him any indemnity (*i*).

Awarding right to sue in partner's name.

A restraint of trade may sometimes lawfully be imposed by an award. Where the arbitrator was to settle the terms and conditions on which the co-partnership between two persons carrying on business as surgeons and apothecaries in a certain town should be dissolved, and it was part of the terms of the submission that one of them should still carry on the business for his sole benefit, the arbitrator was held justified in awarding that it should not be lawful for

Awarding restraint of trade.

(*h*) Wilkinson v. Page, 1 Hare, 276; Routh v. Peach, 3 Anst. 637.

(*i*) Burton v. Wigley, 1 Bing. N. C. 665.

the other to carry on the practice or profession of a surgeon and apothecary in the particular town, or within thirteen miles of it (*k*).

When arbitrator may direct an indemnity.

v. *Directions as to giving an indemnity.*]—Under what circumstances an arbitrator, without special authority, has power to order one party to the reference to indemnify the other against particular contingencies, is not quite clear. It would seem to be the opinion of Lord Denman, C. J., if we may consider his language in one instance as applicable generally, and not merely to the particular case before him, that an arbitrator, on a reference of all matters in difference, has no general power to direct an indemnity (*l*).

Only when a necessary provision.

There must, it seems, be a certain degree of necessity from the nature of the case to warrant such a step.

An award, ordering the defendant to execute a covenant to indemnify the plaintiff against all costs, damages, and expenses, which should happen by means of any further proceedings in a qui tam action against the plaintiff, begun at the instance of the defendant, was held good, on the ground that as the action could not be released, the poor being interested in it, the direction to indemnify was valid from the necessity of the case; and that it was no objection that the amount to be indemnified against was uncertain, as the defendant, by causing the action to be proceeded with, might ascertain it: but it was added, the awarding the indemnity would have been an excess of authority, had there been any means of releasing or discharging the action (*m*).

From another case it may be gathered that if a submission between the plaintiff and defendant alone comprise matters in difference between the defendant and the plaintiff, together with others, and the arbitrator find that the defendant has taken some goods in which the plaintiff and others are

(*k*) Morley v. Newman, 5 D. & R. 317.

(*l*) Ross v. Boards, 8 A. & E. 290.

(*m*) Philips v. Knightley, 2 Stra. 903; S. C. note to Fisher v. Pimbley, 11 East, 190.

jointly interested, he may award to the plaintiff a compensation for the whole value of the property, and direct the latter to give to the defendant an indemnity against the claims of the other interested parties (*n*).

On a general reference, in which the principal question being up to what date the joint liability of the plaintiff and defendant for debts due in respect of a vessel, in which the plaintiff had recently purchased out the defendant's interest, should continue, and from what date the plaintiff should be chargeable alone, the arbitrator awarded that after a specified day the defendant should not bear any debts in respect of the vessel, and ordered the plaintiff to deliver to the defendant a bond conditioned for the payment by the plaintiff of all debts incurred in respect of the vessel after that date. The majority of the court held that the arbitrators had authority to direct the bond to be given, as the creditors were not bound by the award, and might sue the defendant, and so the giving it was only a necessary step to secure the defendant from a liability which the arbitrator had decided ought not to attaeh upon him: Maule, J., however, expressed a doubt whether it was necessarily within the arbitrator's authority to direct an indemnity bond to be given (*o*).

When setting terms of dissolution of partnership.

When the arbitrator has to settle the terms on which a partnership is to be dissolved, and he empowers one partner, to whom he awards the debts due to the firm, to use the other's name in bringing actions, for the sole benefit of the former, it has been assumed that the arbitrator has power to order him to indemnify the other against any liability to costs for the use of his name in the actions, and it was even urged that he was bound to do so, but to this latter proposition the court did not assent (*p*).

When setting terms of purchase.

So where the arbitrator had to settle the price and the terms on which the defendant should purchase an estate of the plaintiff, and he awarded that the defendant should be at

(*n*) Fisher v. Pimbley, 11 East, 188.

(*o*) Brown v. Watson, 6 Bing. N. C. 665. See ante, p. 407.

(*p*) Burton v. Wigley, 1 Bing. N. C. 118.

liberty to use the plaintiff's name in enforcing his rights, Lord Abinger, C. B., expressed his opinion that the arbitrator, if he had pleased, might have fixed the terms on which the defendant should have indemnified the plaintiff against an action (*q*).

Arbitrator has power to direct releases.

VI. *Directions as to executing releases.*]—On a general reference of all matters in difference, the arbitrator has authority to order the parties to execute mutual releases respecting them (*r*), and where "all debts, sums of money, and demands," are submitted, he may direct a release of the bonds, specialties, judgments, executions, and verdicts, by virtue of which the debts, sums of money, and demands are due (*s*). Where a cause only is referred, he has no authority to direct the parties to execute mutual releases of all demands (*t*).

Construction of award of releases.

The generality of the words in the clause of the award directing releases, will, if possible, be construed to be limited to releases respecting all matters comprehended within the submission (*u*), and although the release ordered would in terms release the arbitration bond itself, that shall be intended to be excepted (*x*), for the arbitrator has no power to direct that to be surrendered (*y*).

But if the words in the award be too clear to admit of the limited construction, as if the submission be of all differences arising before the 10th of May, and the award direct releases respecting all differences up to the 20th of May, the award will still be perfectly good, unless some new difference arose between the 10th and 20th of May, and that be shown to the court, (for the court will not intend it with-

(*q*) Round v. Hatton, 10 M. & W. 660.

(*r*) Cable v. Rogers, 3 Bulst. 311.

(*s*) Roberts v. Marriett, 2 Saund. 190.

(*t*) Doe d. Williams v. Richardson, 8 Taunt. 697.

(*u*) Doe d. Williams v. Richardson, 8 Taunt. 697; Barry v. Rush, 1 T. R. 691.

(*x*) Marks v. Marriot, 1 Lord Raym. 114.

(*y*) Doyley v. Burton, 1 Lord Raym. 533.

out it be shown,) and even if a new difference be shown, the award will in general be void only as to the time beyond the submission, and that portion may be treated as surplusage (*z*).

Awarding releases before payment bad.

An award to pay two sums at different times, and that the party to receive them should give one release immediately, has been held to be bad, on the ground that by the release under the provision, the arbitration bond, and the right to the second sum awarded to be paid subsequently, would be discharged (*a*).

Form of award of mutual releases.

It is not necessary for the award to point out the form of the releases, or to show when they are to be executed (*b*).

Awarding conveyances.

VII. *Directions as to executing conveyances.*]—When the question in dispute relates to real property, it often happens, from the nature of the differences, that the arbitrator has to order one party to execute a conveyance to the other; for as the title to land will not pass by the award, when he intends that one party shall have the land, he should also in many cases award a release or conveyance, in order that the award may be final (*c*).

Specifying nature of the conveyances.

In directing a conveyance or other deed, the arbitrator should take care to specify the nature and character of the instrument (*d*), but he need not prepare it himself (*e*).

Arbitrator need not draw the

Thus where an award directed the plaintiff to execute a deed of assignment of some leasehold premises, and a deed

(*z*) Bac. Ab. Arb. E. 1; Hill v. Thorn, 2 Mod. 309; Squire v. Grevett, 2 Ld. Raym. 961; Lee v. Elkins, 12 Mod. 585; Anon. 12 Mod. 8; Hooper v. Pierce, 12 Mod. 116; Abrahat v, Brandon, 10 Mod. 201; Pickering v. Watson, 2 W. Bl. 1118; Stevens v. Matthews, 1 Ld. Raym. 116.

(*a*) Adams v. Adams, 2 Mod. 169.

(*b*) Toby v. Lovibond, 17 L. J. C. P. 201; S. C. 12 Jur. 436. See the Appendix of Forms for the form of an award to execute mutual releases.

(*c*) Johnson v. Wilson, Willes, 248.

(*d*) Tandy v. Tandy, 9 Dowl. 1044; Tipping v. Smith, 2 Stra. 1024; Thinne v. Rigby, Cro. Jac. 314.

(*e*) Tebbutt v. Ambler, 2 Dowl. N. S. 677; See Tomlin v. Mayor of Fordwich, 5 A. & E. 147; Toby v. Lovibond, 17 L. J. C. P. 201; S. C. 12 Jur. 436.

conveyance.

of mortgage of some freehold property, and further, at the request and cost of the defendant, to execute a release of all his right, title, and interest in some other premises; on a motion for an attachment against the plaintiff for not executing certain deeds of assignment, mortgage, and release, tendered to him for execution in pursuance of the award, the plaintiff, who alleged that the deeds were not properly drawn, objected that the arbitrator ought himself to have settled in what terms they should have been drawn and executed; the court however held, that it was not necessary for the arbitrator to have drawn the deeds himself, that he had sufficiently prescribed what the plaintiff had to do, and made the rule for an attachment absolute (*f*).

Advisable to direct which party to prepare it.

The arbitrator is recommended to state in the award at whose expense the conveyance or other instrument is to be prepared, and which of the parties is to prepare it, and tender it to the other for execution, as the parties are very likely to contest the point with each other, and difficulties may arise in enforcing the performance of the award (*g*).

Directing lease of charity estates.

Where an arbitrator has to deal with matters affecting estates dedicated to charitable purposes, he should be cautious to see that his directions are such as the Court of Chancery will sanction. If he direct the trustees of the property to grant a lease of the estates, he should, it is apprehended, in directing the terms of the lease award such terms and such only as the Court of Chancery would permit the trustees of their own accord to have granted (*h*).

(*f*) Tebbutt v. Ambler, 2 Dowl. N. S. 677.

(*g*) Standley v. Hemmington, 6 Taunt. 561; Doe d. Clarke v. Stillwell, 8 A. & E. 645.

(*h*) Attorney General v. Clements, 1 Turn. & R. 58.

SECTION II.

OF DIRECTIONS UNDER A POWER TO AWARD WHAT SHALL BE DONE.

Clause what shall be done.

1. *Whether clause to say what shall be done compulsory.*] —With a view of removing causes of future differences, large discretionary powers to affect the property of the contending parties are, in many instances, given to the arbitrator by the submission. This course is one which meets with the full approbation of the courts (*a*).

The clause giving the authority is often worded thus: "That the arbitrator shall have power to determine what he shall think fit to be done by the parties respecting the matters in dispute."

Whether compulsory to award something.

Under this power the arbitrator need not, unless he choose, give any directions at all; but if the words run, "the arbitrator to determine what he shall think fit to be done," it is not quite clear that they would not at times be construed imperative, and calling upon him to make some regulation or other respecting the property; Parke, B., being of opinion that the clause is imperative, in the same manner as when the arbitrator is to ascertain what costs are to be paid, he has no discretion on the subject, but must ascertain some costs; while Lord Abinger, C. B., with whom the rest of the court concurred, is reported to have intimated that the words, "*what he shall think fit*," import a discretionary power (*b*).

Words "shall or may," construed imperative.

The following case throws light on this question. On the reference of a claim respecting a will and the granting an annuity, a clause in the submission, "that in case the arbitrator shall award any such annuity, he *shall or may*

(*a*) Taylor v. Shuttleworth, 8 Dowl. 281, per Maule, J.

(*b*) Angus v. Redford, 2 Dowl. N. S. 735; S. C. 11 M. & W. 69; Morgan v. Smith, 1 Dowl. N. S. 617; S. C. 9 M. & W. 427.

award the same, with a proviso that in case of a deficiency of assets of the testator, the annuity, or the fund from which the same shall arise, shall abate in the same manner as if it were a provision contained in the will," was held to be imperative, and to make it incumbent on the arbitrator, when awarding the annuity, to insert the proviso in his award (*c*).

In the following instance, the permissive words seem to have been construed to be compulsory from the nature of the circumstances of the case.

Awarding to enjoy property as before.

A claim having been made on a reference respecting the obstruction of a flue, the diversion of a water-spout, and the building over a watercourse, the arbitrator, who had "power to direct how the property should be enjoyed for the future," awarded damages to the plaintiff for the above claims, and directed "that the parties should enjoy the property respectively as heretofore." This the court held was not a final adjustment, but left the property in a state of dispute, pregnant, to a certain degree, with injury, instead of preventing further disputes, which was the peculiar object of the reference (*d*). It is to be observed, that the direction "to enjoy as before" is vague and indefinite, and that the holding the above award to be void does not necessarily determine that the award would have been set aside if the arbitrator had simply been silent respecting the future enjoyment of the property.

Awarding that nothing be done.

Where an action was brought by a reversioner for the continuance of an incumbrance on his land, and it was ordered by the order of reference, that the arbitrator was to say what should be done between the parties by way of a sale or otherwise, respecting the land or premises in dispute, the court held the arbitrator justified in adjudging in terms that nothing should be done between the parties respecting the said land or premises, and Williams, J., distinguished this case from the above-mentioned case of *Morgan* v. *Smith* (*e*) where it was left to the arbitrator to ascertain what

(*c*) Crump v. Adney, 1 C. & M. 355; S. C. 3 Tyrw. 270. See Grenfell v Edgcome, 7 Q. B. 661.

(*d*) Ross v. Clifton, 9 Dowl. 356; (*e*) 9 M. & W. 427.

costs were to be given, on the ground that those words imported that there must be some given, and that there, in not finding the costs, the arbitrator had neglected the point submitted to him; and when the case of *Ross* v. *Clifton* (*f*) was cited as an authority to show that the arbitrator was bound to say something was to be done, Coleridge, J., remarked that in that case it appeared that damage had been occasioned and would continue (*g*).

Valid directions.

II. *Directions as to what shall be done held valid.*]—What is the extent of the authority conferred by clauses empowering an arbitrator to say what shall be done by the parties, and how it ought to be exercised, must depend so much on the special wording of each submission, and the special circumstances of each particular case, that it is difficult to lay down any rule that is not too general to be of much practical utility.

A consideration, however, of the succeeding cases will, it is hoped, assist an arbitrator when he is in doubt as to what is the nature and limit of his own authority, and how his duty may be best performed.

No objections on the merits open.

It may be proper to remark, that the court will not entertain any objection to the directions given in the award as to the mode of enjoyment of property, which resolve themselves into questions on the merits, or are founded on the justice or propriety of the arbitrator's determination with reference to facts (*h*).

Awarding release of annuity.

A cause relating to the breach of an agreement for the purchase of an estate, the price of which was to be paid by the defendant partly by instalments, and partly by an annuity, to be secured on land, was referred, and the arbitrator was empowered to settle the cause and all matters in difference, and to determine what he should think fit to be done by the parties. The non-payment of the annuity, and

(*f*) 9 Dowl. 356.
(*g*) Grenfell v. Edgcome, 7 Q. B. 661.
(*h*) Winter v. Lethbridge, 13 Price, 533.

the omitting to provide such security for the payment, were the breaches complained of. The award directed that the defendant should pay the plaintiff a gross sum by way of damages, and that after the damages were paid, the plaintiff should convey the premises to the defendant, and execute a release of the annuity so agreed to be secured. It was objected that the arbitrator had no authority to award a gross sum to be paid as the value of the annuity. The court, however, held that the direction was fully authorized by the submission, and Tindal, C. J., said, "I agree if the party had brought an action for the arrears of an annuity which were due, and that action had been referred, the arbitrator would have had no right or power to fix the value of the annuity, and to throw so large a burden upon the defendant; but that is not the case here. The original agreement was, not only that the defendant should pay the annuity, but that he should give security for its payment; the non-payment of the annuity, and the omission to provide such security as was required, are the two breaches alleged in the declaration. That subject, therefore, being brought before the arbitrator as one of the matters in difference, and it being expressly stipulated by the order of reference that the parties shall do whatever the arbitrator directs upon that subject, it appears to me that it is within the power given him to find, as we must suppose he has found, that there was no sufficient security in the possession or power of the defendant, and that he should fix what was the value of the annuity, and that it should be paid as matter of damage to the plaintiff (*i*).

Awarding undivided shares of tithes.

An arbitrator, to whom it was referred to ascertain among other things what lands were severally titheable to the rectors of two neighbouring parishes, and who was authorized "to devise all means to prevent future litigation," and generally to settle all matters of difference, and to order and determine what he should think fit to be done, was held to have acted wisely, and perfectly within his authority, in

(*i*) Taylor v. Shuttleworth, 8 Dowl. 281.

making an award which reciting that it was impossible to ascertain the particular parcels of land to which the several rectors were respectively entitled, awarded that the tithes of the whole lands should be divided between them in certain proportions (*k*).

Awarding easement and repairs.

A submission empowered the arbitrator to decide how, and by whom, and in what manner, a certain pump, yard, hedge, and ditch, respecting which disputes had arisen, should in future be enjoyed and occupied, and who should have the care and management thereof. The arbitrator, after finding that the pump was the exclusive property of one of the parties, subject to an easement in it by the other, was held not to be authorized to dispose of the property in it to the other, so as to make the two disputants tenants in common; but it was ruled that he had power to direct that the easement in the pump should continue, and under the provision respecting "care and management," it was decided that he might order that the pump should in future be re paired at the joint expense of the parties, and that the clause empowering him to award "how" the property should be occupied, gave him authority to say under what conditions the occupation should be, and to impose on the party, not the owner of the hedge and ditch, the sole obligation of repairing them (*l*).

Regulating a stream.

Under a power to the arbitrator to decide the right to a certain stream of water claimed in the action, and to regulate the use of it in future, and to order and determine what he should think fit to be done, it was considered that the authority given to the arbitrator to regulate the flow of the stream in dispute, incidentally and necessarily empowered him to affect the enjoyment of other rights of the parties, and to make regulations respecting the flowing of the water in the stream in question, notwithstanding they interfered with the former enjoyment of other streams not the subject of dispute (*m*). But the court seemed inclined to think that

(*k*) Prosser v. Goringe, 3 Taunt. 425.

(*l*) Boodle v. Davies, 3 A. & E. 200.

(*m*) Winter v. Lethbridge, 13 Price, 533.

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the arbitrator had no power to make a prospective regulation respecting the flowing of the water, proceeding on the assumption that the ponds, through which the stream of water was stated in the declaration to have flowed, might possibly be hereafter filled up, and providing for that contingency; and that he had authority to regulate the stream only whilst it should continue to flow through those ponds. They held, however, that though such hypothetical directing might be void as exceeding the submission, such excess could not vitiate the other directions in the award independent of it (*n*).

Hypothetical provision for future changes.

Directing change from wood to iron machinery.

Under a reference to settle the matters in difference, and to award such alterations in the defendant's works as to the arbitrator should seem necessary, regard being had to thr state at a particular period, an award directing no other alteration than that certain parts of the machinery, which were of wood, should be made of cast iron, was held a due execution of the authority (*o*).

Directing to sue in plaintiff's name.

We have before seen that an arbitrator, who has to settle at what price and on what terms the defendant shall purchase the plaintiff's estate, may award that the defendant, after the conveyance of the property to him, shall be entitled to use the plaintiff's name in enforcing his rights, and may, if he please, fix the terms on which the defendant shall indemnify the plaintiff against an action (*p*).

Invalid directions.

III. *Directions as to what shall be done held void.*]—A consideration of the following instances will, it is hoped, assist the arbitrator in guarding against making a faulty direction.

Awarding verdict.

The power to order and direct what he shall think fit to be done by and between the parties respecting the matters in dispute, does not authorize the arbitrator to direct a ver-

(*n*) Winter v. Lethbridge, 13 Price, 533.

(*o*) Walker v. Frobisher, 6 Ves. 70.

(*p*) Round v. Hatton, 10 M. & W. 660; see the previous section, d. 5, p. 409.

dict to be entered in the cause referred (*q*). A suggestion, however, was in one case thrown out by the bench, that when the verdict was taken on the reference for too small a sum, the arbitrator, under this clause, might possibly have authority to direct an application to be made to the court to enlarge the amount of damages, and that the defendant should consent to the enlargement (*r*).

Directing increase of damages.

An action, in which the plaintiff claimed a right of way, (not a carriage way,) was referred to an arbitrator, who was to settle all matters in difference between the parties, and to direct in what manner the road in question (if he should find for the plaintiff) should be enjoyed. The arbitrator awarded a verdict for the plaintiff, and that the plaintiff was entitled to a right of way including a carriage way. Though there were contradictory affidavits as to whether the plaintiff's claim to a carriage way was a matter in dispute before the arbitrator, the court held that the arbitrator, in awarding a carriage way, had clearly exceeded his authority, and set aside that part of the award (*s*).

Awarding a carriage way.

When the arbitrator exceeds the power delegated to him in directing something to be done which he has no power to order, we have before seen that though that direction be void, the rest of the award independent of it may often stand (*t*). Yet when the arbitrator has power to direct, and has directed accordingly, and that direction is bad for uncertainty, the award in general cannot be supported in any part (*u*).

Uncertain directions invalid.

A landlord having removed some grates, locks, bolts, and fastenings, from the demised premises, a direction by the arbitrator ordering the tenant to put up other grates, locks, bolts, and fastenings, in the place and stead of such as had been removed, was held bad for uncertainty, the award not showing what fixtures had been removed, or specifying the

Not specifying fixtures.

(*q*) Hayward v. Phillips, 6 A. & E. 119.

(*r*) Prentice v. Reed, 1 Taunt. 151.

(*s*) Hooper v. Hooper, M'Lel. & Y. 509.

(*t*) See P. 2, ch. 5, s, 9, d. 1. p. 316.

(*u*) Stonehewer v. Farrar, 9 Jur. 203.

nature, quality, or price of those which were to be substituted (*x*).

Not specifying precautions or process of filtering.

The plaintiff, a bleacher, complained of the defendant's polluting a stream of water by his works; and the arbitrator, who was empowered to regulate the mode in which the water should be enjoyed, awarded that the defendant should take *all proper and reasonable precautions* and measures for preventing the water of the stream from being rendered unfit for the use of the plaintiff, and that all refuse waters from the defendant's works should, at the defendant's expense, be passed through filters, so as to be thereby effectually purified and cleansed, so far as the same could be purified and cleansed *by the ordinary and most approved process of filtering*. The court held the award bad, as uncertain, ambiguous, and not final, because it did not prescribe or ascertain in any way how the water was to be prevented from becoming unfit for the purposes of bleaching, or if rendered unfit, how it was to be purified and cleansed by the defendant; that the direction to use all proper and reasonable precautions did not at all point out to the defendant what he was to do; and that ordering him to purify the water by the use of the ordinary and most approved process of filtering was also insufficient, as it was not certain what the ordinary and most approved process of filtering was; and Lord Denman, C. J., added the following important observations:—"It is said that the arbitrator would run great risk by setting out in his award what acts were to be done, because he might fail in directing them scientifically. But I think he runs a much greater risk of making an imperfect award, if he do not make himself scientifically master of the subject before him, so as to discover how justice may be dealt to the litigating parties. He is bound to understand the matters in dispute so accurately and fully, that the acts being done which he has prescribed, it may be clear that the award has been obeyed. The words in which the arbitrator describes what shall be done should be certain,

Duty of arbitrator as to matters of science.

(*x*) Price v. Popkin, 10 A. & E. 139.

and accompanied in his own mind with an understanding of what he prescribes" (*y*).

Not specifying capacity of drain.

Vague and imperfect directions in an award often lead to renewed litigation. Some commissioners, under an Inclosure Act, being empowered to set out public ditches, ordered the owners of lands over which a certain drain set out by them passed to cleanse and keep it "of sufficient width and depth to carry off the water intended to run down the same." Some years afterwards the plaintiff cut a sough or under-drain across his close, opening into the drain in question, which in the part of it immediately below (where it ran across the defendant's lands) was not of sufficient capacity to carry off the additional water brought in by the sough. The plaintiff contended that it was the defendant's duty to make it sufficient for that purpose. The court, however, remarking that the award was lamentably vague in its terms in not explaining what water was intended to run down the drain, ultimately held that this method of draining by a sough or under-drain not being contemplated by the award, the defendant was not required to make and keep the drain of the increased size and depth demanded (*z*).

SECTION III.

OF DIRECTIONS AS TO ALLOTTING LANDS.

Award under Inclosure, &c. Acts.

1. *Directions under Inclosure Acts.*]—As persons appointed under private Acts of Parliament for inclosing waste lands and commuting tithes have to decide on the various

(*y*) Stonehewer v. Farrar, 9 Jur. 203; S. C. 6 Q. B. 730.

(*z*) Sharpe v. Hancock, 7 M. & G. 354.

rights of parties interested, and to perform duties in many respects analogous to those of arbitrators, and are even sometimes so styled, some points respecting awards in such cases may here, it is apprehended, be noticed with advantage.

Allotment for right not extinguished by Act.

Commissioners under an Inclosure Act have no power to make allotments in respect of other rights than those which are to be extinguished under the powers of the Act, and for which allotments in compensation are provided to be given. Hence they are not justified in allotting to a Lord of a Manor a portion of the waste in lieu of his right to warren, such right not being mentioned in the Act (*a*).

Specifying exchanged lands.

Where, besides allotting the common lands, they are empowered to assign lands in exchange for other lands, so that the exchange shall be ascertained by the award, the award will convey no title to a close assigned in exchange, unless it state in respect of what particular land the land assigned is given in exchange; for with a view to the charges affecting the original property it is of extreme importance that the exchanges should be ascertained (*b*).

Reciting fact of proper consent.

If the Act require the previous consent, in writing, of the respective proprietors to sanction the exchanges, it would seem advisable at least that the award should recite that such consent had been given (*c*).

Awarding to parish officers in succession.

When an Inclosure Act directed that the grass and herbage of the parcels set out for getting materials for the repair of the highway should remain for ever for the benefit of such persons as the commissioners should appoint, it was held that they were authorized to award the herbage to the surveyors of the highways of a certain parish, "and their successors for the time being;" for although the award was bad as a common law conveyance, the surveyors not being a corporation, it was good as a parliamentary declaration of the persons entitled to take the herbage, and had the same effect as if the direction had been inserted in the Act (*d*).

(*a*) Casamajor v. Strode, 2 M. & K. 706.
(*b*) Cox v. King, 3 Bing. N. C. 795.
(*c*) Cox v. King, 3 Bing, N. C. 795.
(*d*) Johnson v. Hodgson, 8 East, 38.

Specifying lands liable to tithe rent charge.

If by private Act of Parliament the estate of one proprietor in a parish be alone to be charged with a rent charge in lieu of tithes, an arbitrator who has to ascertain the amount of the rent charge, and who is at liberty to apportion it in parts on distinct parts of the estate, need not, unless he think fit to make an apportionment, specify what lands the proprietor has in the parish, but it is sufficient if his award charge the rent charge in one entire sum "on all and every the lands and grounds" of the proprietor within the parish (*e*).

What a neglecting to make an award.

Under a private Act of Parliament a commissioner was to allot waste land, and a specified arbitrator was empowered to declare by an award, within six months after the passing of the Act, the amount of rent charge to be paid in lieu of tithes, and the statute further provided, that in case he should neglect or refuse to act, another arbitrator should be nominated with like powers by a certain party; although it was assumed, on the construction of the Act, that the arbitrator could not make an award before the inclosure commissioner had made his, and the latter had not awarded before the six months had expired, it was held that the arbitrator, by not making an award within the six months, had "neglected" to do so within the meaning of the Act, though he afterwards made an award (*f*).

Powers of commissioners of partition.

II. *Directions in making partition of lands.*]—Commissioners of partition appointed by the Court of Chancery being judges of the parties' own choosing, are looked upon by the Court of Chancery in a light very similar to arbitrators; their proceedings are clothed with somewhat the character of a reference; and the same principles which guide the courts in respect of arbitrators are, in a great measure,

(*e*) Willoughby v. Willoughby, 4 Q. B. 687.

(*f*) Willoughby v. Willoughby, 16 L. J., Q. B. 251.

applicable to the consideration of the award of the commissioners (*g*).

As arbitrators are sometimes called upon to make partition of lands, it may not be inexpedient to consider the powers which the commissioners have for that purpose.

Awarding right of way.

It seems the latter are justified in awarding a right of way for one party to his own portion of the lands over the portion of the lands allotted to another party; or that one may enter the lands of the other for the purpose of repairing and cleansing watercourses: they may direct such new fences to be made as are reasonably necessary for dividing off the lands which are the subject of partition; and they may allot to one party as his lot the mansion-house and grounds, and also other lands at a distance from the house and grounds, and separated from it by lands allotted to another (*h*).

Erection of fences.

Separated lots to one party.

Arbitrator making partition must award conveyances.

When an arbitrator is appointed to make partition of lands among tenants in common, he must not only set out the separate portions for the respective parties, but must direct deeds of conveyance to vest the allotments in the several owners, or the award will not be final, and his duty will have been incompletely performed (*i*).

(*g*) Jones v. Totty, 1 Sim. 136; Manners v. Charlesworth, 1 M. & K. 330; Story v. Johnson, 1 Y. & C. 538.

(*h*) Lister v. Lister, 3 Y. & C. 540.

(*i*) Johnson v. Wilson, Willes, 248; Knight v. Burton, 6 Mod. 231, see ante, p. 411.

SECTION IV.

OF DIRECTIONS AFFECTING STRANGERS TO THE SUBMISSION.

Direction to pay money to a stranger void.

1. *Directing a payment to be made to a stranger.*]—If an arbitrator direct a party to do a thing to a mere stranger to the submission, as to pay a stranger a sum of money, the direction is void; and the award will often be void also as not being mutual, if the payment or thing to be done be in satisfaction of the claims of the other party, for then the latter, if the award were held good, would lose his right without receiving any compensation (*a*).

When rest of award good.

The direction as to the stranger has often been held void, and the rest of the award sustained, where the courts have considered that the parties to the submission were not prejudiced if the award as to the stranger were not complied with. Thus, where the award directed that the defendant should make a lease of certain land to the plaintiff for life, with remainder to a stranger in fee, the court held, that though the award was void as to the remainder to the stranger, it ought to be performed as to the lease for life (*b*). So where there were disputes between the plaintiff and defendant respecting certain lands, an award that the plaintiff and his wife should enjoy the land, was held void as to the wife, she not being a party to the submission (*c*). So, also, a direction to pay ten shillings to the writer of the award was held bad and void (*d*).

Direction valid when for party's benefit.

The award, however, is held to be mutual if the thing to be done to the stranger to the submission be beneficial to the party entitled to receive satisfaction; and on this princi-

(*a*) Dale v. Mottram, 2 Barnard. 291.

(*b*) Bretton v. Prat, Cro. Eliz. 758; Pope v. Brett, 2 Saund. 292. See also Rous v. Lun, 1 Keb. 569; Alsop v. Senior, 2 Keb. 707, 718; Anon. 1 Leon. 316.

(*c*) Samon's Case, 5 Rep. 77, b.; Samon v. Pit, Rolle, Ab. Arb. B. 7, p. 243.

(*d*) Busfield v. Busfield, Cro. Jac. 577.

ple it is said, if the arbitrator direct that one party shall pay money to the servant of the other (*e*), or that the defendant shall pay a sum to a stranger to discharge money owing to the latter by the plaintiff, the award may be sustained (*f*).

To pay stranger for use of party.

An award to pay a sum of money to two part-owners of a ship for the use of themselves and the rest of the part-owners and mariners parties to the submission, is good (*g*). So an

To pay a joint debt.

award that the parties shall in certain proportions discharge a debt by bond in which they are jointly bound, is valid, although the obligee be no party to the submission (*h*). And so it seems is a direction that one of two joint-owners of a vessel shall discharge a debt due to a stranger for things supplied to the vessel, though a stranger cannot have an attachment to enforce payment (*i*). But the party is

Stranger dying, payment to his executors.

bound to pay the stranger according to the award, and if the latter die, payment must be made to his personal representative, whether the award order payment to the stranger only, or use the words to the stranger or his assigns (*k*).

Whether benefit need to appear on face of award.

In one case, Holt, C. J., said, that an award to pay a stranger, without showing that the payment was any benefit to the party, was good, as it should be presumed that the payment was for the party's benefit. Powell, J., on the contrary, was of opinion that it was void, unless the advantage to the party appeared on the face of the instrument: he, however, agreed that the benefit sufficiently appeared in an award on a submission between two brothers, which directed each of them to pay a certain sum to a stranger for the use of their mother (*l*).

Stranger not expressly authorized to receive.

It has been held, that directing payment to a third person for the use of a party is good, even though the person to receive the money do not appear to be invested with any express authority by the party for whom the money is to be

(*e*) Dudley v. Mallery, 3 Leon. 62; Norwich v. Norwich, 3 Leon. 62.

(*f*) Bedam v. Clerkson, 1 Ld. Raym. 123; Rolle, Ab. Arb. E. p. 247.

(*g*) Wood v. Thompson, Rolle, Ab. Arb. F. 11, p. 249.

(*h*) Gray v. Gray, Rolle, Ab. Arb. E. 6, p. 247.

(*i*) Skeete, In re, 7 Dowl. 618.

(*k*) Anon. 1 Leon. 316.

(*l*) Bird v. Bird, 1 Salk. 74.

paid (*m*). And on a dispute between two partners, principally as to whether one of them had brought in his proper share into the stock, the arbitrator was considered justified in awarding that the one who was deficient should pay a sum of money into the hands of a person who was agent for the partners, in trust for both partners, and for the benefit of the partnership (*n*).

Agent of firm.

But when on a reference of partnership disputes the award directed that some of the parties to the reference should pay certain amounts found due from them into the hands of one of the arbitrators, to be by him applied in the payment of certain specified debts due from the firm, the court held the direction bad and the whole award void, although it appeared by the award that the payments would have been for the benefit of the parties; since the arbitrators who directed the payments had no control over the single arbitrator, to compel him to a due application of the money (*o*).

Payment to arbitrator for party's benefit.

II. *Directing a stranger to do an act.*]—A direction in an award that a stranger shall do an act is in general void, because another in his natural freedom is not supposed to be within the party's power (*p*). On this principle an award that the defendant shall enter into a bond to the plaintiff with sureties conditioned for the payment of money at a future day is void as to the sureties (*q*); so an award that the defendant and one of the arbitrators shall enter into a bond to the plaintiff is void as to the arbitrator (*r*); so likewise directions that a party to the reference and his wife and son (the two latter not being parties) shall convey an estate (*s*); or that a party shall deliver up a deed or a house

Directing a stranger to do an act void.

Bond with sureties.

Arbitrator to be surety.

Wife to convey.

To deliver deed not in possession.

(*m*) Snook v. Hellyer, 2 Chitt. 43.

(*n*) Dale v. Mottram, 2 Barnard. 291.

(*o*) Mackay, In re, 2 A. & E. 356.

(*p*) Bac. Ab. Arb. E. 4; Mudy v. Osam, Litt. 30.

(*q*) Cooke v. Whorwood, 2 Saund. 337; Rolle, Ab. Arb. F. 2, p. 248; Norwich v. Norwich, 3 Leon. 62; Thursby v. Helbert, Carth. 159; S. C. 1 Show. 82; Moore v. Bedel, Rolle, Ab. Arb. B. 5, p. 247.

(*r*) Pits v. Wardal, Godb. 164.

(*s*) Barney v. Fairchild, Rolle, Ab. Arb. E. 10, p. 248, N. 9, p. 259.

stated to be in the possession of another (*t*); or that a stranger shall pay the costs of the reference (*u*), are all void.

Stranger to pay costs.

So we have just seen, that directing one of the arbitrators to apply the money awarded to be paid into his hands by the parties as the award ordered it should be applied, is void, as the other arbitrators have no means of enforcing the proper application of the fund (*x*).

Arbitrator to apply funds.

Direction valid where stranger bound to obey.

But if it appear that the party has any means either at common law or equity to compel the stranger to perform the act which he is directed to do, the award is good (*y*).

To give release.

Therefore an award that one of the parties shall discharge the other of a bond in which both are bound to a stranger, is a good award, for it shall be intended that the money was to be paid at a day to come, and therefore the party directed might then tender it and acquit the other; and if the day of payment be past he may pay the penalty and compel the creditor to give a release in a court of equity (*z*). So an arbitrator may order one of the parties to discharge the other from his undertaking to pay a debt to a third person not a party to the submission; for when the debt is paid the stranger can be compelled in equity to give a release to him that had undertaken to pay it (*a*).

When stranger merely ministerial.

It is said an award that one shall surrender his copyhold into the hands of the tenants of a manor who shall present it, or that one party shall cause a feoffment to be made with a letter of attorney to J. S. to make livery is good, on the ground that the tenants in the former and J. S. in the latter case, though strangers to the reference, are to be used only as instruments (*b*); but where the submission is respecting the right, title, and possession of certain land, the arbitrator has

(*t*) Lee v. Elkins, 12 Mod. 585; Lane v. Tanner, cited in Dale v. Mottram, 2 Barnard. 291.

(*u*) Proudfoot v. Poile, 3 D. & L. 524.

(*x*) Mackay, In re, 2 A. & E. 356. See the previous division, p. 427.

(*y*) Com. Dig. Arb. E. 13; Phillips v Knightley, Fitzg. 272; Dudley v. Mallery, 3 Leon. 62; Lynch v. Clemence, Lutw. 571; Rolle, Ab. Arb. F. 1, p. 248.

(*z*) Bradsey v. Clyston, Cro. Car. 541; S. C. Bac. Ab. Arb. E. 4, Anon. March. 18.

(*a*) Beckett v. Taylor, 1 Mod. 9; S. C. 2 Keb. 546, 554.

(*b*) Coote v. Pooly, Rolle, Ab. Arb. E. 7, p. 247.

no authority to award that one of the parties shall procure the Lord of the Manor to grant a copyhold, or a stranger to make a release or a confirmation (*c*).

Directing act by the court.

An award to levy a fine is valid, for though it is an act of the court, yet by the law and public justice of the kingdom it is not to be refused to any man, but if the award be to command the justice to do it, this, it is said, is no good award, for the parties in effect pray leave to agree from the king himself, which is quite different from a command (*d*).

To levy fine.

Discontinuance.

An award to make a discontinuance of an action is good, for though the discontinuance be the act of the court, yet the default on which it necessarily proceeds is the act of the party. The same principle applies in the case of a direction to submit to a nonsuit or to enter a retraxit (*e*).

Nonsuit retraxit.

Party submitting on behalf of a stranger.

If a person submit to an award on the part and behalf of a stranger, the arbitrator has full authority to direct an act to or by the stranger, not that he can bind the stranger himself by the award, but the party, when submitting on behalf of another, incurs the penalty of disobeying the award, if that other fail to do what the award requires him (*f*).

III. *Directions affecting a stranger's property.*]—As the submission only refers to the arbitrator questions between the parties, the moment he touches the interests of strangers, he exceeds his authority (*g*).

Award on stranger's property void.

Award to pay at stranger's house.

A direction, however, to pay money at the house of a stranger is good; for the party ordered to pay can come to the house without entering it, and a payment as near to the house as can be is, it seems, sufficient, and so the party can obey the award without being guilty of a trespass (*h*). But

(*c*) Anon. F. Moore, 3 pl. 11.

(*d*) Bac. Ab. Arb. E. 4; Rolle, Ab. Arb. F. 3, 4, pp. 248, 249.

(*e*) Com. Dig. Arb. E. 13; Rolle, Ab. Arb. F. 7, p. 249.

(*f*) Shelf v. Baily, 1 Com. Rep. 183; Bacon v. Dubarry, 1 Ld. Raym. 246; Cayhill v. Fitzgerald, 1 Wils. 28, 58; Adams v. Statham, 2 Lev. 235; Browne v. Meverell, Dyer, 216, b.

(*g*) Turner v. Swainson, 1 M. & W. 572.

(*h*) Lynsey v. Aston, Rolle, Ab. Arb. E. 2, p. 247; S. C. 2 Bulst. 38; Anon. 1 Keb. 92: Bac. Ab. Arb. E. 4.

if the payment is to be on the land of a stranger, or at the house, and the owner of the house has the adjacent land, so that the party cannot go there without committing a trespass, the direction is void (*i*). In an old case, where money was awarded to be paid in the bishop's palace, it was held a good award, for it was said a license would be intended, especially as in the particular case the bishop himself made the award (*k*).

Directing payment out of stranger's funds.

Where the arbitrator ordered some bankers, parties to the reference, to pay to the other party, the defendant, out of funds in their hands belonging to a firm of which the defendant was a member, a certain sum, stated to be the amount of a debt due to the defendant from his partners, these latter not being partners to the submission, the direction was held invalid (*l*).

Under the power to say what should be done, an arbitrator must be cautious in directing a party to do anything to property in which strangers are interested.

Directing something to be done on stranger's land.

Where the award, under a clause empowering the arbitrator to direct what should be done, ordered a party to put up a stile and footbridge on land which appeared by the affidavits to belong to a stranger, the court set the award aside so far as regarded that provision; although it was sworn that no doubt the owner of the land would have granted permission to enter it for that purpose; Parke, B., adding, however, that in his opinion the award would have been sufficient if the terms had been conditional, namely, to do the acts required, provided the owners and occupiers of the land should consent (*m*).

Good if conditional on consent had.

When a reversioner complains of an injury to his house, though the arbitrator under the clause in question cannot order the parties to do anything to the house, without, it seems, being liable himself to an action of trespass if his orders be obeyed, when the tenant of the injured pre-

(*i*) Taverner v. Skingley, Rolle, Ab. Arb. E. 3, p. 247.

(*k*) Horton v. Benson, Freem. 204.

(*l*) Ingram v. Milnes, 8 East, 444.

(*m*) Turner v. Swainson, 1 M. & W. 572.

mises is no party to the reference, yet he may (and if the submission be compulsory it seems he should) direct the defendant to do some act to remove the grievance, conditionally, if the consent of the tenant can be obtained, or at all events at the end of the term, or he may order some compensation to the plaintiff in respect of the continuance of the injury (*n*).

Directing tenant to commit waste.

Under a like power, where the arbitrator ordered the defendants, who were lessees of a water-mill, to make a tumbling bay on the land in their tenancy for the discharge of the water injuring the plaintiff's land; the court held, that if the defendants had been seised in fee of the land the direction in the award would have been perfectly good, but that the power given to the arbitrator to determine what he should think fit to be done must be confined to reasonable acts, and that as the making a tumbling bay on the land held by them as tenants would render them liable to be sued by their landlord for waste, the award was void as to that direction, but good as to the rest (*o*).

Party and stranger jointly interested in property.

Though to direct a party to meddle with property, with which he has no right to interfere, is an excess of authority, yet where an award ordered the defendant to remove from a river certain hatches, two of which were the defendant's own property, while in the third he had only a share, and also further provided that the directions in the award should refer only to such interest as the defendant should have in the hatches, the court enforced the award by attachment, saying, that though the direction as to the hatch in which the defendant had only a share might be nugatory, the award as to the hatches of which the defendant was sole owner was to be obeyed (*p*).

Showing in the award direction as to stranger justified.

Whenever an arbitrator embodies in his award a direction as to anything to be done by a stranger to the submission, or affecting the property of a stranger, which primâ facie would appear to be exceeding his authority, he is

(*n*) Angus v. Redford, 2 Dowl. N. S. 735; S. C. 11 M. & W. 69.
(*o*) Alder v. Savill, 5 Taunt. 453.
(*p*) Doddington v. Bailward, 7 Dowl. 640.

PART II. CH. VIII. S. 4.

recommended to state on the face of the award sufficient facts to enable the court to see that he is justified in giving such directions. Where an arbitrator awarded that the defendants had no title to a certain roadway, but that they should have and enjoy another road which ran in a different direction, (not saying over whose land,) the court held the award bad, as it did not appear by the award that the defendants had any legal title to the road granted them, the award not stating that the ground of the road belonged to either of the parties (*q*).

(*q*) Harris v. Curnow, 2 Chitt. 594. See Turner v. Swainson, 1 M. & W. 572. Semble contrâ.

CHAPTER IX.

THE PERSONAL INTERESTS OF THE ARBITRATOR.

Scope and contents of the ninth chapter.

THE preceding chapters of this part having been devoted to a full exposition of the arbitrator's power and duty in deciding as judge between the parties, this, the concluding chapter, is dedicated to a consideration of his personal interests.

Section one treats of the remuneration to which he is entitled for his services, and the means at his disposal for insuring payment.

The second section points out his liability at law for extortionate demands, for corruption, or improper directions in his award, and his duty in respect of money or chattels deposited in his hands to abide the event of his decision.

His liability in equity to costs for misconduct forms the subject of the third section.

The fourth remarks on his position, when called as a witness; and after discussing the propriety of his making out of court voluntary statements or affidavits respecting his award at the request of a party, winds up the whole with noting the distinction in this respect, which the etiquette of the bar often makes between a lay and a legal arbitrator.

SECTION I.

OF THE ARBITRATOR'S RIGHT TO REMUNERATION.

PART II. CH. IX. S. 1.

Though the cases are not quite agreed on the subject, it seems the better opinion that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services (*a*).

Whether arbitrator can sue for fees.

His remuneration, it is said, like that of a physician or barrister, is to be left to the option of his employers, and cannot be enforced by action.

Where express promise to pay charges.

Where, however, there is an express promise to pay, he may maintain an action; for the taking upon himself the burthen of the reference is quite a sufficient consideration (*b*).

Whether remedy for fees by attachment.

According to Eyre, C. J., the court will give the arbitrator a remedy for his fees by attachment against the party or parties whom the award directs to pay them, on the ground that the party who is bound by the rule of court to obey the award, is consequently bound to pay the costs of the award pursuant to its directions (*c*).

In a more recent instance, however, where an award was taken up by one party, and all the costs paid to two out of the three arbitrators, the court refused to grant the third arbitrator a rule, calling on the parties to pay him such sum as should be found on taxation due as a compensation for his services. It was urged that the arbitrator became a party to the rule of court, which, taken with the award, amounted to an express promise by the party to pay the costs of the award. But it was answered that the whole costs had been paid pursuant to the award, and that the remedy, if any, of the

(*a*) Virany v. Warne, 4 Esp. 46. See Swinford v. Burn, Gow. N. P. 5, contrâ; Burroughes v. Clarke, 1 Dowl. 48.

(*b*) Hoggins v. Gordon, 3 Q. B. 466; Hardress v. Prowd, Sty. 465.

(*c*) Hicks v. Richardson, 1 B. & P. 93.

third arbitrator, was against the other two, who had received the amount. In refusing the rule, Taunton, J., expressed his disapprobation of the opinion above cited of Eyre, C. J. (*d*).

There does not seem to be any recorded instance of an attachment being granted to enforce the arbitrator's claim.

Practice not to deliver award until fees paid.

It is usual, therefore, for an arbitrator to settle for himself what he considers a proper remuneration for his trouble. He ought not in general, as we have before observed, to state the sum in the award (*e*); but on giving notice to the parties that the award is ready for delivery, it is advisable to notify also to them the amount of his charges, in order that the party who comes to take up the award may be prepared to pay them. As the retention of the award is the only security on which the arbitrator can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party demanding it until he has paid the arbitrator's charges. This mode of securing payment has been sanctioned by judicial approbation, even where the party who takes up the award is not by the terms of its provisions to be the party ultimately liable to them; since the party paying in the first instance may redress himself by attachment, and recover from his opponent all the costs of the award that its directions impose upon the latter (*f*).

(*d*) Burroughes v. Clarke, 1 Dowl. 48.

(*e*) See P. 2, ch. 7, s. 1, d. 3, p. 373, as to awarding costs of award.

(*f*) Hicks v. Richardson, 1 B. & P. 93; Stokes v. Lewis, 2 Smith, 12.

SECTION II.

OF THE LIABILITY OF THE ARBITRATOR AT LAW.

PART II. CH. IX. S. 2.

Arbitrator attempting to extort excessive fee.

1. *Liability in respect of fees.*]—The courts, till very recently, seem to have assumed that the amount charged for fees by the arbitrator, might be reviewed by them as against the arbitrator. As between party and party it is clear the arbitrator's charges will be taxed, and, if excessive, reduced (*a*); but it seems to have been taken for granted that the arbitrator could be compelled to deliver up the award on payment of the reduced amount. For example, it was held in one case, with reference to the question when the time for setting aside the award commenced, where the arbitrator's claim was alleged to be exorbitant, that the award was not to be considered published until the arbitrator's charges had been taxed by the officer of the court, on the ground that it could not be considered to be ready when it was only to be had on submitting to a wrongful demand (*b*). This ruling assumes that after taxation the arbitrator could be forced to deliver the award up on tender of the sum found reasonable by the Master. It is true the decision as to the time of publication has been overruled, but not on the ground of any mistake in the power of the court over an arbitrator (*c*).

Whether liable in action for withholding award.

Not liable to attachment.

How far the arbitrator is liable to an action for wrongfully withholding the award, if he refuse to deliver it up except on payment of an extortionate fee, does not seem to have been decided in any case; but it is now clear that the courts have no power to issue an attachment against him on the ground of such refusal (*d*).

(*a*) Brazier v. Bryant, 2 Dowl. 600. See ante, P. 2, ch. 7, s. 1, dd. 1, 3, pp. 370, 373.

(*b*) Musselbrook v. Dunkin, 9 Bing. 605.

(*c*) Macarthur v. Campbell, 5 B. & Ad. 518; Brooke v. Mitchell, 6 M. & W. 473; Moore v. Darley, 1 C. B. 445; Brazier v. Bryant, 2 Dowl. 600.

(*d*) Dossett v. Gingell, 2 M. & G. 870; note, 872.

On one occasion, indeed, the court granted a rule nisi, calling on an arbitrator to refund the difference between the sum he obtained from the party before he delivered up the award, and the amount of fees allowed to be proper on taxation; and though they refused to make the rule absolute, it was not on any ground of want of jurisdiction, but on the ground of the lapse of time, and the death of the attorney who could have explained the circumstances (*e*).

No attachment against arbitrator refusing to refund excess.

But it has been recently determined that there is no summary jurisdiction in the court over an arbitrator. And where an arbitrator refused to deliver the award up, except on the payment of an exorbitant fee, and thus compelled the party to pay it, as he did under protest, the court, on the ground of want of jurisdiction over the arbitrator, refused an application for an attachment to force him to refund the amount found on taxation to be an excess (*f*).

Court no jurisdiction over arbitrator.

The remedy, if any, to recover the sum overpaid, seems to be by action for money had and received (*g*).

Whether excess recoverable by action.

In a case where the award was set aside for a gross mistake of the arbitrator, a suggestion was thrown out by Tindal, C. J., whether, as the consideration seemed to have failed for which the money expended in taking up the award was paid, the amount could be recovered from the arbitrator. He, however, expressly guarded himself against being supposed to give an opinion on the point (*h*).

Under a statute of the time of James I., (*i*) on a reference of a cause by any court, a penalty of a forfeiture of £100, and loss of his place in the court, is imposed on the referee who should take any money for making his report or certificate.

Penalty for taking fees in certain cases.

This seems to apply only to officers of the court acting in discharge of their official duties.

(*e*) Brazier v. Bryant, 2 Dowl. 757; S. C. 3 M. & Sc. 844.

(*f*) Dossett v. Gingell, 2 M. & G. 870.

(*g*) Dossett v. Gingell, 2 M & G. 870; note, 872.

(*h*) Hall & Hinds, In re, 2 M. & G. 847.

(*i*) 1 James 1. c. 10. See the Appendix of Statutes.

II. *Liability in respect of the award.*]—An action, it is said, may be maintained against an arbitrator for making a corrupt or partial award (*k*).

Whether arbitrator liable in action for corrupt award.

On a motion to set aside an award in the time of Holt, C. J., the Court of Queen's Bench, though in opposition to that learned judge's opinion, who stated it to be contrary to all practice, ordered some arbitrators, who were accused of mismanagement and refusing to hear the defendant's case, to attend and be examined, saying that they deserved to be punished. The examination was made in court by affidavit as to all their proceedings, and it is stated great mismanagement appeared. It is not, however, reported whether anything was done to them in consequence (*l*).

Misconduct a misdemeanour under the Lands and Railways Clauses Acts.

If an arbitrator or umpire, after making and subscribing the declaration required by "The Lands Clauses Consolidation Act, 1845" (*m*), and "The Railways Clauses Consolition Act, 1845" (*n*), that he will faithfully and honestly, and to the best of his skill and ability, hear and determine the matters referred to him, "shall wilfully act contrary thereto, he shall be guilty of a misdemeanor."

Arbitrator directing trespass liable to action.

Although there be no misconduct, an arbitrator may, it seems, sometimes render himself liable by the directions of his award. Thus, on the reference of an action by a landlord against a stranger for an injury to his reversion, the arbitrator, it is said, will be guilty of a trespass, if, when the tenant is no party to the submission, he, without the latter's consent, order anything to be done to the demised premises, and the party ordered carry out the directions of the award (*o*).

Liability for appointing a receiver.

If the arbitrator appoint a person as receiver to receive the debts due to a firm respecting whose interests he is empowered to award, it is possible the arbitrator may incur

(*k*) Wills v. Maccarmick, 2 Wils. 148.

(*l*) Morris v. Reynolds, 2 Ld. Raym. 857.

(*m*) 8 & 9 Vic. c. 18, s. 33. See the Appendix of Statutes.

(*n*) 8 & 9 Vic. c. 20, s. 134. See the Appendix of Statutes.

(*o*) Angus v. Redford, 11 M. & W. 69; S. C. 2 Dowl. N. S. 735.

a liability in case the receiver so appointed becomes insolvent (*p*).

III. *Liability of the arbitrator when a stakeholder.*]—It is not uncommon for a sum of money or a chattel in dispute to be deposited in the arbitrator's hands to abide the event of the award. After depositing it, a party cannot divest it out of the arbitrator's custody, since the latter being a stakeholder has an authority coupled with an interest which cannot be revoked, and he is perfectly justified in detaining it until he has decided the question of title. Each party making claims before him has an interest in the fund or chattel dependent on the contingency of the award being wholly or partially made in his favor, and if the party depositing it afterwards become bankrupt, such contingent interest is all that passes to his assignees (*q*).

Liability of arbitrator holding chattel to abide the award.

Bankruptcy of party depositing.

On a fiat issuing after a deposit of money nice questions often arise respecting the conflicting rights of the assignees and of the party to whom the award decrees it; therefore if the arbitrator have not paid the sum over, when adverse claims are made upon him, he should in prudence, for security's sake, apply to the court under the Interpleader Act (*r*). In a recent instance, the court ordered that the arbitrator, who had made his award, should, after deducting the costs to which he had been put, to be taxed by the Master, pay the residue into court, and thereon be discharged, the costs to be ultimately paid by the claimant who should be unsuccessful in the issue directed to be tried (*s*).

Interpleader on adverse claims.

In a case decided on the old bankrupt law before the 2 & 3 Vict. c. 29, when the title of the assignees had relation back to the act of bankruptcy, it was held that they had no right to recover from an arbitrator a sum of money deposited in his hands by the bankrupt, (after a secret act of bank-

Liability for money had and received.

(*p*) Lingood v. Eade, 2 Atk. 501.

(*q*) Tayler v. Marling, 2 M. & G. 55; Gunton v. Nurse, 5 Moore, 259.

(*r*) 1 & 2 W. IV. c. 58.

(*s*) Tayler v. Marling, 2 M. & G. 55.

ruptcy,) with the consent of a creditor who had made a claim on it, the arbitrator being appointed to ascertain the amount of the claim and to pay that amount to the creditor; it being proved that the arbitrator had kept the sum distinct from his own money, and after ascertaining the amount of the claim, had paid it over to the creditor without any notice of the act of bankruptcy. The assignees were held entitled to the balance remaining in the arbitrator's hands after paying the debt, but as to the portion paid over the arbitrator was looked upon as a mere channel of conveyance, and therefore not liable (*t*).

To whom arbitrator should deliver chattel.

If on the trial of an action of trespass or trover respecting a personal chattel, in which the defendant justifies, by alleging title to the property, a verdict be taken for the plaintiff with damages the full value of the article, subject to a reference to an arbitrator, who is to decide the question of ownership, and in whose hands the chattel is deposited until the award is made; and it is agreed that if he award for the plaintiff the verdict shall stand as it is, but if for the defendant that then a verdict shall be entered for the latter; and the award find that the property was the plaintiff's, the arbitrator, if the submission do not point out what is to be done with the deposit, should not deliver it to the plaintiff, (for he cannot be entitled both to the thing itself and to the full compensation in damages which the verdict gives him,) nor should he part with it to the defendant until the verdict for the plaintiff has been satisfied. But after payment of the damages he should hand it over to the defendant; for the effect of the verdict in law is, that by the payment the plaintiff's right of property is barred, and the property is vested in the defendant (*u*).

If the defendant have relied on the title of another, a stranger to the action, who, though not a party to the submission, in fact assented to the reference and the deposit of the article, the stranger has no right whatever to demand it

(*t*) Tope v. Hockin, 7 B. & C. 101.

(*u*) Gunton v. Nurse, 5 Moore, 259; Cooper v. Shepherd, 3 C. B. 266; Adams v. Broughton, 2 Stra. 1078; S. C. Andr. 18.

from the arbitrator, for the award concludes him from saying that the original property was not the plaintiff's, and the defendant, the party who is liable to the damages, is alone justified in claiming the goods (*x*).

In the case of a verdict of a jury, it is to be observed that this principle of law applies only where the damages are estimated on the footing of the full value of the thing deposited (*y*); it is presumed, therefore, that a like distinction should be made on a reference.

Liability of arbitrator in trover for the chattel.

If, after the decision is made, the unsuccessful party, notwithstanding the award, demand the property, and the arbitrator refuse to deliver it to him; such refusal is perfectly justifiable, as it is in effect saying, "I cannot deliver it to you because I have awarded that it does not belong to you;" and it does not amount to an unlawful conversion for which an action of trover can be sustained (*z*).

SECTION III.

OF THE LIABILITY OF THE ARBITRATOR IN EQUITY.

Arbitrator made defendant to bill to impeach award may generally demur.

We now proceed to consider how far the arbitrator may be made liable in equity as a defendant on a bill brought to set aside the award.

As the plaintiff must by his bill show some claim of interest in the defendants in the subject of the suit which can make them liable to the plaintiff's demands, the arbitrator,

(*x*) Gunton v. Nurse, 5 Moore, 259.

(*y*) Lacon v. Barnard, Cro. Car. 35; Holmes v. Wilson, 10 A. & E. 511, note.

(*z*) Gunton v. Nurse, 5 Moore, 259.

if he be made a party to a bill filed to impeach the award, may in general demur to the whole bill, as well to discovery as to relief (*a*).

Bill to impeach award for mistake.

If the award be impeachable for mistake or mis-calculation, however palpable, the bill, to have it rectified, should be brought only against the party in whose favor the award is made, and not against the arbitrator (*b*).

Striking out arbitrator's name as defendant.

It is reported that in one instance where an arbitrator accepted the office on the proviso that the parties would enter into a rule not to bring a bill in equity, and the party against whom the award was made nevertheless made the arbitrator a defendant to a bill charging corruption and partiality, Lord Chancellor King, on motion by the arbitrator, directed that his name should be struck out from being a party to the cause (*c*).

No demurrer when gross misconduct charged.

In some cases, however, where the award has been assailed on the ground of misconduct in the arbitrators, and they have been made parties to the suit, the court has gone so far as to order them to pay the costs (*d*). And in such instances Lord Redesdale considers that a demurrer to the bill would not have been allowed (*e*).

In *Lord Lonsdale* v. *Littledale* (*f*), a demurrer by an arbitrator to a bill of this nature was in fact overruled, though not expressly upon the ground of the propriety of making an arbitrator a party, but because the bill charged certain specific acts which showed combination or collusion between him and one of the parties, and made him the agent for such party, and which the court therefore thought required an answer (*g*).

Costs may be prayed against corrupt arbitrator.

From the preceding cases it may be collected that arbitrators can only be made parties to a suit when it is intended

(*a*) Steward v. E. I. Company, 2 Vern. 380.

(*b*) Anon. 3 Atk. 644.

(*c*) Lingood v. Croucher, 2 Atk. 395, per Lord Hardwicke, C.

(*d*) Ward v. Periam, cited in Chicot v. Lequesne, 2 Ves. Sr. 315; Chicot v. Lequesne, 2 Ves. Sr. 315; Ld. Lonsdale v. Littledale, 2 Ves. Jr. 451.

(*e*) Mitford's Plead. in Chanc. 187, 5th Ed.

(*f*) 2 Ves. Jr. 451.

(*g*) 1 Daniell's Chanc. Pract. by Headlam, 287.

to fix them with the payment of costs in consequence of their corrupt or fraudulent behaviour; and in such cases it is apprehended that the bill ought specifically to pray that relief against them (*h*). No decree can be made against them for anything else than costs (*i*).

Arbitrator need not answer as to grounds of award, but must to charge of corruption.

When made parties, they are not bound to answer as to their motives in making the award; and they may plead to that part of the bill in bar of such discovery, and they may plead the award in bar, though it be defective in point of law for not being final (*k*); but it is incumbent upon them as upon other defendants, if they be charged with corruption and partiality, to support their plea by an answer showing themselves incorrupt and impartial (*l*); for it would be very inequitable to leave them at liberty to plead their own award in order to cover their own misbehaviour (*m*).

Arbitrator, when entitled to costs. Corruption proved, condemned in costs.

The answer of the arbitrator may entitle him to have the bill dismissed as against him and to have his costs (*n*); but if it appear on evidence that he has been guilty of the corruption or collusion charged, we have previously seen that the penalty attaching to him in equity is, that he may be condemned to pay them (*o*).

(*h*) 1 Daniell's Chanc. Pract. by Headlam, 287.

(*i*) Steward v. East India Company, 2 Vern. 380.

(*k*) Anon. 3 Atk. 644; Lingood v. Croucher, 2 Atk. 395.

(*l*) 1 Daniell's Chanc. Pract. by Headlam, 287; Lingood v. Croucher, 2 Atk. 395.

(*m*) Rybott v. Barrell, 2 Eden. C. C. 131.

(*n*) Ld. Lonsdale v. Littledale, 2 Ves. Jr. 451.

(*o*) Lingood v. Croucher, 2 Atk. 395; Chicot v. Lequesne, 2 Ves. Sr. 315; Ward v. Periam, cited in Chicot v. Lequesne, 2 Ves. Sr. 315; Ld. Lonsdale v. Littledale. 2 Ves. Jr. 451.

SECTION IV.

OF TESTIMONY BY THE ARBITRATOR.

PART II. CH. IX. S. 4.

Arbitrator as witness.

1. *The arbitrator called as a witness.*]—Though the arbitrator's whole power over the parties ends with the award, yet as his testimony respecting matters connected with the reference is often requisite, it is advisable for him carefully to preserve the notes which he has made of the evidence taken before him. Though the notes are his own, and the court has no power to compel them to be produced, or make any order respecting them any more than with respect to a judge's minutes (*a*), yet he may require them to assist his memory in giving an account of what took place before him.

Whether arbitrator need state grounds of award.

An arbitrator may often be called as a witness to give evidence in the courts both of law and equity respecting proceedings in the arbitration. There does not seem any privilege attaching to him in his judicial character, whether he be a legal or lay person, entitling him to refuse his testimony, though it has been held that he may decline to state the grounds on which he made his award.

For where in an action on an award the defendant called the arbitrator to prove the ground on which he made his award, in order to show that he had exceeded the limits of the submission, Mansfield, C. J., told the witness that he need not be examined unless he chose, thinking that an arbitrator was not, after making his award, to be worried as a witness. The arbitrator in consequence declined to be examined. On a motion for a new trial, and cause shown, no objection was made to this decision (*b*).

(*a*) Scougull v. Campbell, 1 Chitt. 283.

(*b*) Ellis v. Saltau, 4 C. & P. 327, note; Johnson v. Durant, 4 C. & P. 327. See Anon. 3 Atk. 644.

Inquiry of arbitrator whether matter considered.

In a more recent case, where the award made no allowance to the plaintiff in respect of a certain guarantee, and the plaintiff filed a bill in the Court of Chancery in Ireland, complaining that in taking the account the guarantee had been excluded; the court said that the plaintiff might have examined each of the arbitrators, and asked them whether they had abstained from weighing the effect of the guarantee, thinking it beyond their jurisdiction, or for any other cause, or whether they had taken it into their consideration together with the other matters in difference in coming to their conclusion on the whole case. And Lord Chancellor Hart added, had the case originally come before him he should have directed a short inquiry to examine the arbitrators on that single point (*c*).

Arbitrator proving proceedings in reference.

The arbitrator may be a witness to prove a submission by parol, to state facts relating to the conduct of a party which show his assent to be bound by the award (*d*), to prove what matters were matters in difference in the reference (*e*), and whether a party claimed compensation for a particular injury (*f*).

In an old case, where the award was general and purported to decide all matters in difference, the court refused to receive evidence to contradict the award, or to allow the arbitrator to be called to prove that in respect of a claim made before him and within the submission, he had refused to award a compensation (*g*).

Proving admission of parties.

He may be called upon to prove admissions made by the parties in the course of the proceedings, other than mere admissions made for the purpose of bringing peace, for there is no ground why the statement of the parties before an arbitrator should be excluded, as they are not made in confidence or with a view to a compromise, and the matter

(*c*) Brophy v. Holmes, 2 Molloy, 1.

(*d*) Adams v. Bankhart, 1 C. M. & R. 681.

(*e*) Ravee v. Farmer, 4 T. R. 146; Golightly v. Jellicoe, cited in note, 4 T. R. 146; Trimingham v. Trimingham, 4 N. & M. 786.

(*f*) Martin v. Thornton, 4 Esp. 180.

(*g*) Shelling v. Farmer, 1 Stra. 646.

comes as adversely before him as before any other tribunal (*h*).

What admissions made before arbitrator receivable.

Lord Kenyon, at one time, made it a rule never to receive evidence of any admissions of the parties whatever, which were made on a reference that was not effective; but he subsequently stated that he felt he had carried the rule too far, and that he should receive evidence of all admissions before an arbitrator which the defendant would be obliged to make in equity, and reject none but such as were mere concessions with a view to a compromise (*i*).

In a subsequent case, the same learned judge rejected the evidence of an arbitrator under the following circumstances. An action, brought by a master against his servant for money had and received, coming on to be tried, the servant offered to suffer a verdict against himself, provided his master would produce his books before an arbitrator, and it did not appear by the master's cheques and entries that the servant had fully accounted. A verdict was accordingly taken by consent, and the cause referred, with power to the arbitrator to examine the parties upon oath, and to compel a production of the books. The arbitrator having examined the books, and the parties on oath, awarded in favor of the servant, who subsequently brought an action against his master for maliciously holding him to bail in the former cause. On the trial, the plaintiff's counsel called for the books, and proposed to examine the arbitrator to prove his case, but Lord Kenyon rejected the evidence, saying, "It seems to me the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties themselves, or on an inspection of the books, upon the principle that the parties themselves could not have been examined in the former cause, nor could the plaintiff have been compelled by a judge at Nisi Prius to

(*h*) Slack v. Buchannan, 1 Peake, N. P. C. 7; Doe d. Lloyd v. Evans, 3 C. & P. 219; Westlake v. Collard, Bull. N. P. 236, b, 7th Ed.; Gregory v. Howard, 3 Esp. 113.

(*i*) Slack v. Buchannan, 1 Peake, N. P. C. 7.

produce his books, and it would be a dangerous thing if such evidence were admitted to prove the arrest in that cause to be malicious, as the arbitrator might have proceeded to cut the knot rather than to unloose it, according to the strict rules of law, from a wish to do complete justice between the parties (*k*).

But where the plaintiff said to the clerk of the defendant's attorney, that he would refer the question in dispute to him as an arbitrator, and on the clerk declining the office, added a statement admitting the defendant's set-off; the court held that the statement of the plaintiff was admissible against him, and might be proved by the clerk, as it was no concession to buy peace, although the clerk added that the plaintiff desired him to communicate to the defendant what he had said, with a view of inducing the latter to agree to a compromise (*l*).

Whether arbitrator should state grounds of award to a party.

II. *Voluntary statements by the arbitrator.*]—It is a question deserving the deliberate consideration of the arbitrator in each particular case, under what circumstances, and to what extent, he should give an explanation of the grounds of his award, in answer to inquiries by either party, made with a view of taking proceedings to impeach or defend it.

We have before seen that in many cases the courts will refuse to receive the arbitrator's statements, in which event the explanation would be merely useless (*m*).

But assuming the statements available as evidence, and the arbitrator willing to answer questions, it seems advisable, as far as may be, if circumstances permit, to adopt the course followed by some arbitrators, when a verbal explanation is sought, of declining to answer inquiries, unless both parties call together to receive the explanation; for it may be remarked that a verbal ex parte communication is open to objection in some respects; since if the arbitrator be led

(*k*) Habershon v. Troby, 3 Esp. R. 358.

(*l*) Thomson v. Austen, 2 D. & 38.

(*m*) P. 2, ch. 5, s. 8, d. 2, p. 300.

into conversation with a party, or with the attorney of one of the parties, alone, it is possible he may do the absent party a serious injury by an unguarded expression, which a question from the latter, had he been present, might have induced him to qualify. It is also possible that the result of the interview may not be exactly and impartially reported. To prevent misconception, the arbitrator, if he can, had better make all his communications in writing.

Affidavit of mistake.

When the courts were more willing than they now are to set aside an award for mistake, we have previously seen that the affidavits of the arbitrator, admitting that the mistake had been made out to his satisfaction, was perpetually required by Lord Thurlow, C., before he annulled the award (*n*).

Affidavit to explain award.

We have before noticed that an affidavit will not be received from an arbitrator to explain his intention in awarding in a particular manner, the terms of the award being clear (*o*).

Affidavits of proceedings in the reference.

A narration of mere facts concerning the proceedings in the reference, stands on a very different footing from an explanation of the mode in which the arbitrator has performed his judicial functions, and when no ground of etiquette interposes, there seems no reason why an arbitrator should not depose to them as well as any one else.

Accordingly we find on motions for setting aside awards, or in showing cause against such motions, affidavits of arbitrators are constantly used in the courts of law and equity to explain alleged irregularities, to answer charges of misconduct, to show under what circumstances particular meetings were held, and in what manner the award was executed (*p*).

Barrister arbitrator not make affidavit.

III. *When the arbitrator is a barrister.*]—When the arbitrator happens to be a barrister, he is not usually expected to make

(*n*) P. 2, ch. 5, s. 8, d. 1, p. 299.
(*o*) Gordon v. Mitchell, 3 Moore, 241.
(*p*) Price v. Williams, 1 Ves. Jr. 365; Hare, In re, 6 Bing. N. C. 158; S. C. 8 Dowl. 71; Kingwell v. Elliott, 7 Dowl. 423; Blundell v. Brettargh, 17 Ves. 232; Cleesly v. Peese, 8 Moore, 524; Stalworth v. Inns, 13 M. & W. 466.

an affidavit for the purpose either of supporting or setting aside the award.

There is a well-understood rule among the members of the bar that they should decline to make affidavits respecting matters in which they are engaged professionally; in which capacity they are considered to be acting when filling the office of arbitrator (*q*). The rule has continually met with the sanction of the courts, and when some members of the bar, in their anxiety to give a full explanation of their conduct as arbitrators, have made affidavits, the courts, on some occasions, have expressed their regret at the step they have taken (*r*).

Using arbitrator's notes on motion to set aside award.

Where a matter had been referred to a barrister, and on showing cause against a motion to set aside the award, the counsel proceeded to read a copy of the arbitrator's notes, verified by his clerk; the opposing counsel objected to his doing so on the ground that it would be in substance infringing on the rule above alluded to. It was stated that the arbitrator was willing to furnish the court with the original notes. But on Coleridge, J., saying the rule laid down by the bar was a very proper one, and that it would certainly be infringing on it if such notes were to be received, the point was not further pressed, and the notes were not used in the argument (*s*).

Barrister declining to explain to the parties.

The same ground of professional etiquette which precludes a barrister acting as arbitrator from making an affidavit, will sometimes induce him to decline answering inquiries of the parties.

In a recent case in the Queen's Bench, where a motion was made to set aside the award of an eminent barrister, on the ground of irregularity in examining a witness of the defendant's, no one being present on behalf of the plaintiff; the arbitrator, in answer to a letter of the defendant's attorney, requesting him to explain the facts, and inquiring whether he would be willing to state on affidavit the circum-

(*q*) Dobson v. Groves, 6 Q. B. 637.

(*r*) Keene & Atkinson, In re, Exch. Ap. 16, 1847.

(*s*) Doe d. Haxby v. Preston, 3 D. & L. 768.

stances and purpose of the meeting, wrote as follows: "I very deeply regret that I cannot comply with either of your requests. I feel an intense anxiety to explain under what circumstances, and for what purpose, I saw either of those gentlemen on the day you name, but I consider it would be improper in me to give any such explanation to any of the parties concerned. The court have the power, if they think fit, of calling upon me for an explanation, and I shall be rejoiced if they will afford me the opportunity of giving it, and that they may not be disappointed, I will make it my object to be in court, ready to give any information which may be called for, if you will let me know the day on which it is arranged to dispose of these rules." This letter was brought before the court by the affidavit of the defendant's attorney. The court, however, did not make any application to the arbitrator to explain, but on the evidence contained in the affidavits before them set aside the award for the irregularity. In giving judgment, Lord Denman, C. J., by noticing the fact that a special pleader present at the meeting, though not professionally, who had declined to make an affidavit on the ground of professional etiquette, might with propriety have given evidence, seems, by his silence respecting the arbitrator's refusal, tacitly to have assented to the correctness of the course adopted by that latter gentleman (*t*).

Whether court can notice explanatory letter.

In one instance where there were several arbitrators, all barristers, one of whom made an affidavit, while the other two, though declining to make affidavits, wrote letters explanatory of what were the matters in difference on the reference, Pollock, C. B., expressing his regret that the one should have made an affidavit, seemed to think he might look upon the letters of the other arbitrators as good as affidavits, but Parke, B., doubted whether the court could notice them at all (*u*).

Court in-

We have before seen that in some instances, though

(*t*) Dobson v. Groves, 6 Q. B. 637.

(*u*) Keene & Atkinson, In re, Exch. Ap. 16, 1847. See P. 2, ch. 5, s. 8, d. 2, p. 303.

rarely, the court will direct an inquiry to be made of the arbitrator as to particular facts (*x*). When such is the case, the arbitrator should confine his answer to the points on which the court has asked information, and not go into a general history of the case (*y*).

quiring of the arbitrator the grounds of the award.

(*x*) See P. 2, ch. 5, s. 8, d. 3, p. 304.
(*y*) Morgan v. Mather, 2 Ves. Jr. 15.

PART THE THIRD.

PART THE THIRD.

The Consequences of the Award.

Statement of the scope and contents of the third part.

In this the last part, taking up the award as made, our employment is to record its effect, to illustrate the proper mode of performing its requisitions, to exhibit how it may be made available as a cause of action, or means of defence at law, and as a ground of proceedings in equity, or plea in bar of a suit: and how, after making the submission a rule of court, the award may be enforced by attachment, execution under the statute of Victoria, or by judgment and execution in the cause referred.

Having provided thus for a valid award, our attention is directed to the steps that may be taken in the case of one that is defective; and succeeding chapters make manifest, how, and for what cause, an award may be summarily set aside on motion; the judgment entered pursuant to it in the cause referred annulled; or the award itself impeached in equity.

The consequences which follow on the failure of the reference, are declared in the chapter that concludes the work.

CHAPTER I.

EFFECT OF THE AWARD.

Contents of the first chapter.

THIS chapter treats of the effect of an award generally, as a final judgment in law and equity; it examines how far an award concludes a party from subsequently proceeding to enforce a claim within scope of the reference, accidentally or intentionally kept back from the arbitrator's notice; it considers the effect of an award to transfer a right to property; it directs attention to the consequences of an award on particular subjects and to particular parties, and to strangers, and under the various kinds of submissions; and it shows the consequences of the bankruptcy of a party, and states the operation of a defective award.

Award final judgment on all matters.

1. *The award a final judgment in law and equity.*]—An award is a final and conclusive judgment, as between the parties, respecting all the matters referred by the submission. It binds the rights of the parties for all time (*a*).

Certificate final.

Whether the arbitrator be appointed to make a certificate or an award, his decision in each case is equally conclusive (*b*).

(*a*) Day v. Bonnin, 3 Bing, N. C. 219; Bird v. Cooper, 4 Dowl. 148; Bac. Ab. Arb. E; Stonehewer v. Farrar, 9 Jur. 203.

(*b*) Price v. Price, 9 Dowl. 334; Williams v. Moulsdale, 7 M. & W. 134.

Award as a decree in equity.

In equity, on a submission by order of the court, the award is viewed as a decree, and as equally, if not more conclusive (*c*).

Yet in some cases the Court of Chancery will not allow an award to be made binding its officers. For where accounts were directed to be taken by the Master, and liberty was by consent given to the parties to submit to arbitration any question of account, the court gave liberty to the Master to adopt the arbitrator's conclusions, but would not, even by consent, make it compulsory on him to do so (*d*).

Award made after authority gone.

An award made after the time limited for making it has expired, when the delay has been occasioned by the fault of a party (*e*), or after revocation of the arbitrator's authority without sufficient grounds (*f*), has, we have seen, in certain cases an effect in equity.

Parol award.

When a verbal award is valid and effectual has also been previously considered (*g*). How it is to be enforced by action (*h*), and whether an attachment (*i*) will issue for disobedience to it, will be discussed hereafter.

Award under seal no deed.

An award under seal is not a deed, unless delivered as a deed, but is merely a writing under hand and seal (*k*).

Colorable decreet arbitral in Scotland.

II. *Effect of a colorable award.*]—It seems to have been not uncommon in Scotland for parties who had had matters in dispute between them, and had come to an agreement respecting them, to put that agreement into the form of a

(*c*) Travers v. Lord Stafford, 2 Ves. Sr. 19; Pitcher v. Rigby, 9 Price, 79.

(*d*) Scale v. Fothergill, 8 Beav. 361.

(*e*) Morse v. Merest, 6 Madd. 26. See P. 2, ch. 3, s. 2, d. 4, p. 146, as to giving further time; P. 3, ch. 12, s. 2, enforcing contract in equity.

(*f*) See P. 2, ch. 3, s. 3, d. 3, p. 156, as to refusing injunction against enforcing award.

(*g*) See P. 2, ch. 5, s. 1, d. 1, p. 236.

(*h*) Hanson v. Liversedge, 2 Vent. 242; S. C. Carth. 156. See P. 3, ch. 3, s. 2, d. 1, pleading parol award.

(*i*) See P. 3, ch. 6, s. 1, d. 4.

(*k*) Brown v. Vawser, 4 East, 584. See P. 2, ch. 5, s. 1, d. 4, p. 242, no deed stamp requisite; P. 3, ch. 3, s. 2, d. 1, profert unnecessary in pleading it.

submission and decreet arbitral, for the purpose of giving it effect; and an opinion was entertained by some of the most eminent men at the Scotch bar that a decreet arbitral might properly be used to carry an agreement into execution, and might be valid as such, though so used. A transaction of this nature, however, coming before the House of Lords, it was there decided that an agreement carried out under color of a submission and decreet arbitral, could not be looked upon as a valid submission or a valid decreet arbitral (*l*).

No action for matters within scope of submission.

III. *Effect of an award on matters in difference not brought forward.*]—After an award has been made, no action can be maintained for any matter in difference within the scope of the submission, though it were not in fact brought before the arbitrator, nor can advantage be taken of it in answer to a motion for an attachment. Parties, therefore, must be careful to bring forward at the time of the reference every claim within the submission on which they intend to insist (*m*).

Arbitrator bound by former award.

As an award directing mutual general releases closes all accounts between the parties up to the time of the submission, it precludes a second arbitrator on a subsequent reference of all matters in difference, from awarding in respect of a claim which existed at the time of the former submission, and might have been decided by the former arbitrator, although in fact it was not considered or awarded on by him (*n*).

Demand omitted.

On one occasion, where the arbitrators left out of their consideration a demand clearly within the submission, but which being admitted by the opposite party was wrongly held by the arbitrators not to be a matter in difference on which they ought to adjudicate, the court seemed to think,

(*l*) Maule v. Maule, 4 Dow. 363; Routledge v. Carruthers, 4 Dow. 392.

(*m*) Dunn v. Murray, 9 B. & C. 780; Dicas v. Jay, 6 Bing. 519; Smith v. Johnson, 15 East, 213; Collins v. Powell, 2 T. R. 756.

(*n*) Trimingham v. Trimingham, 4 N. & M. 786.

that supposing the award were allowed to stand, there would be a great difficulty in recovering that debt by any subsequent proceeding (*o*).

Whether suit will lie in equity for matter omitted.

How far a suit will lie in equity in respect of a matter neglected to be brought forward, is not quite clear (*p*).

Accidental omission.

It has been said by an equity judge in Ireland, that though an award made on a submission of all matters in difference, is a bar to any action respecting a claim intentionally kept back on the reference, yet it is not so if there have been a purely accidental omission, or a positive refusal by the arbitrators to consider the claim, as not being within the submission; though if they treat it as within the submission, and decide, though wrongly, against its validity, no action respecting it can be maintained, and no relief can be had in equity (*q*).

Party made to account for item omitted.

On a reference of all matters in difference, for the purpose of winding up the affairs of a partnership, and dividing the capital, an item in the account of good debts owing to the partnership was accidentally omitted, and the award was made on the basis of that account, directing one of the partners to receive the good debts; the court of equity, to prevent the omission from being prejudicial to the interests of those entitled to the fund, directed the appointed partner to account for what he had received of the good debts beyond the amount estimated in the award (*r*).

Award not conclude matters not in difference.

An award on a submission of all matters in difference, is no bar to the recovery of a demand which, though it existed as a claim at the time of the reference, was not then a matter in difference (*s*).

Therefore where the defendant, owing the plaintiff a sum of money for arrears of an annuity, gave him a cognovit for them, but disputed the plaintiff's claim to other sums due

(*o*) Robson & Railston, In re, 1 B. & Ad. 723. See P. 3, ch. 9, s. 3, d. 4, matter omitted ground for setting aside award.

(*p*) Jones v. Bennett, 1 Bro. P. C. 528. See P. 3, ch. 9, s. 3, d. 7, as to discovery of new matters.

(*q*) Brophy v. Holmes, 2 Molloy, 1.

(*r*) Spencer v. Spencer, 2 Y. & J. 249.

(*s*) Ravee v. Farmer, 4 T. R. 146; Golightly v. Jellicoe, 4 T. R. 147, n.

on a partnership account between them; and on the same day that the cognovit was given, both parties executed an agreement of reference touching the accounts and all matters in dispute; but no question respecting the arrears was raised before the arbitrators; the court held the claim on the cognovit was not a matter in difference at the time, and that the plaintiff was not precluded by the award in his favor, or a release of all demands in general terms executed by him pursuant to it, from proceeding to enforce the cognovit (*t*).

Award no waiver of extrinsic objections.

Nothing but the questions actually referred are concluded by an award. Thus a reference of the quantum of a demand does not waive any objection to the illegality of it in an action for the sum awarded due (*u*). Nor where a verdict is found for the plaintiff, subject to a point of law, and leave is reserved to the defendant to move to enter a non-suit, does an agreement to refer to arbitration the amount of the damages, and an award made, waive the question of legal liability, unless the defendant expressly consent to abandon it (*x*).

Effect of award on the cause referred.

IV. *Effect of an award on some special matters.*]—The effect of the award on the cause referred having already been incidentally discussed (*y*), and the proceedings in the action to judgment and execution by virtue of the award forming the subject of a subsequent chapter (*z*), it is needless here to do more than to direct attention to the chapters which treat on these heads.

On costs.

So we may dispose of the question of costs, since the effect of the award as to costs generally has been stated at length in the second part (*a*); and special consideration has been directed to the consequences which follow when the

(*t*) Upton v. Upton, 1 Dowl. 400.

(*u*) Steers v. Lashley, 1 Esp. 166.

(*x*) Oxenham v. Lemon, 2 D. & R. 461.

(*y*) See P. 2, ch. 6, p. 336, awarding on a cause.

(*z*) See P. 3, ch. 8.

(*a*) See P. 2, ch. 7, p. 369, awarding as to costs.

award directs payment of the costs of the cause (*b*), and when the submission provides that costs shall abide the event (*c*).

On the rights of a married woman.

On a reference by a husband respecting a claim to chattels real or personal, in right of his wife, we have previously seen that the award operates as a sort of judgment, and is a reducing of them into possession (*d*). When a husband has contracted to sell his wife's real estate, at a price to be fixed by arbitration, how far equity will enforce the award, is elsewhere considered (*e*).

On matters not referable.

When the question referred relates to transactions clearly illegal, or is such as cannot properly form the subject of a reference, the award is not binding, and cannot be enforced (*f*).

On matters criminal.

How far matters and proceedings of a criminal nature fall within this prohibition, has been fully discussed in the commencement of this work (*g*).

Award cannot transfer right to land.

v. *Effect of an award to transfer property.*]—An arbitrator cannot by his award transfer the right to an interest in lands from one to another, whether the submission be by deed or not (*h*); neither can he make partition of land between tenants in common by his award, for the land will not pass by it, but he must direct the parties to execute conveyances to each other of the allotted portions (*i*).

Yet it is said in an old case that if a dispute be between two respecting the title to a lease for years of land, and they submit the matter to arbitration, and the arbitrator

(*b*) See P. 2, ch. 7, s. 1, d. 4, p. 377.

(*c*) See P. 2, ch. 7, s. 2, p. 379.

(*d*) See P. 1, ch. 2, s. 1, d. 3, p. 23.

(*e*) See P. 1, ch. 2, s. 1, d. 3, p. 23, husband forced to procure wife's conveyance; P. 3, ch. 4, s. 1, d. 2, valuation made carelessly.

(*f*) Steers v. Lashley, 6 T. R. 61; Thorp v. Cole, 4 Dowl. 457; S. C. 2 C. M. & R. 367; S. C. in error, 1 M. & W. 531. See P. 1, ch. 1, s. 1, dd. 1, 3, pp 6, 12.

(*g*) See P. 1, ch. 1, s. 2, p. 14.

(*h*) Rolle, Ab. Arb. A.; Marks v. Marriott, 1 Ld. Raym. 114.

(*i*) Johnson v. Wilson, Willes, 248.

award that one party shall have the land, or shall have the term, this is a good gift of the interest in the term; but if the award be that one shall permit the other to enjoy the term, this is no good gift of the interest in it (*k*). This case, however, seems in effect only to show that the award is conclusive as between the parties on a question of disputed title, not that it has power to transfer the right from one to the other.

May decide title as between parties.

When it is necessary for the party to whom the arbitrator has awarded property to make out a title to it as against a stranger to the submission, then it is clearly seen that the award has not the effect of a conveyance.

Not give title as against stranger.

An action between the owner of land and a party holding by his permission, but claiming to hold as bailiff and not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties respecting the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner one month after.

On an issue between the landlord and an execution creditor of the tenant, whether the crops growing on the land (which had been seized by the creditor after the delivery of the award, but before the month had expired or the landlord taken possession) were the property of the tenant or not, the court held that the award had not the effect of transferring to the landlord the property in the land, or in the growing crops which would have passed with the land (*l*).

Though an award in an action of ejectment determining the right, and ordering the land to be delivered up to the lessor of the plaintiff, was held to be conclusive in favor of the plaintiff's claim, on a second action of ejectment between the same parties; in giving that judgment the court, in explanation of the effect of the award, said that the award could not have the operation of conveying the land, but that

(*k*) Trusloe v. Yewre, Cro. Eliz. 223; 2 Leon. 104.

(*l*) Thorpe v. Eyre, 1 A. & E. 926.

there was no reason why the defendant might not conclude himself by agreement from disputing the title of the lessor in ejectment, and that as the parties had consented that the award should be conclusive as to the right to the land, that was sufficient to bind them in the action of ejectment (*m*). Commenting on this case in the one previously quoted, Patteson, J., said the effect of the award here was, that the land *had always been* the property of the claimant, but that in the case before him the award found that the property in the land, so far as the possession during the term was concerned, was in the tenant, and then he added, "Is there any instance in which an award has been held to *transfer* property?" (*n*).

The following case shows that personal property cannot be transferred by an award.

Award cannot transfer personal property.

An award, ordering that a tenant should deliver up to his landlord on a certain day a stack of hay left on the premises by the tenant, on the tenant being paid or allowed a certain sum in satisfaction; it was held that the property in the hay did not pass to the landlord on his tender of the money by mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay, and therefore that the landlord could not maintain trover for it, but that his remedy was on the award: though had the tenant accepted the money that would have been a ratification of the award, and an assent to the transfer of the property (*o*).

Award by statute may operate as a conveyance.

An award made under an Act of Parliament differing from an award under a private submission, often has the effect of transferring property of its own force without any subsequent act of the parties.

Award under Inclosure Act.

Thus, under the old general Inclosure Act, stat. 41, Geo. III. c. 109, the legal title to an allotment of land is acquired by the award of the commissioners, when duly executed and proclaimed, without any conveyance.

(*m*) Doe d. Morris v. Rosser, 3 East, 15.

(*n*) Thorpe v. Eyre, 1 A & E. 926.

(*o*) Hunter v. Rice, 15 East, 100.

Whether title given by allotment before award.

It is to be observed that by that Act the title does not vest by the mere allotment of the land to the party. It is the subsequent award that conveys the title (*p*). Even where a local act gave the parties power to enclose or fence in their allotments, and to sell and convey their interests in them before the execution of the award, it was held that this power to enclose, and so to enjoy in severalty, and to sell, might well be exercised without the legal seisin in the land, that there was nothing to countervail the effect of the general Act above alluded to, and that therefore the legal freehold did not pass to the allottee before the execution of the award (*q*).

Award extinguishing right to tithes.

The right to tithes may be extinguished by an award under a statute directing commissioners to set out, allot, and award portions of the waste in lieu of tithes; but it does not, under this provision, pass by the mere allotment before the award is made (*r*).

When title to compensation money complete.

It may be noticed that the legal title to the purchase-money or compensation-money to be ascertained by the award of a commissioner under an Inclosure Act is not complete until the award be made. Therefore, if a person entitled to such money assign away his interest before the award is made, he is not a necessary party to a bill filed by the assignee for the recovery of the money (*s*).

When title to land pass by allotment.

In some instances, however, the legislature by the use of appropriate words gives the seisin and legal estate upon the allotment only, and before the execution of the award (*t*).

Award a parliamentary declaration.

Under a statute which directed that the herbage of certain closes should be and remain to the use and benefit of such persons as the commissioners should appoint, an award assigning the herbage to the surveyors of the highways for a certain township, and their successors for the time being,

(*p*) Farrer v Billing, 2 B. & A. 171; See 1 & 2 Geo. IV. c. 23.

(*q*) Farrer v. Billing, 2 B. & A. 171; Greathead v. Morley, 3 M. & G. 139.

(*r*) Ellis v. Arnison, 5 B. & A. 47.

(*s*) Cator v. The Croydon Canal Company, 4 Y. & C. 405.

(*t*) Doe d. Harris v. Saunder, 5 A. & E. 664; Kingsley v. Young, 17 Ves. 468; 18 Ves. 207; Doe d. Duke of Beaufort v. Neeld, 3 M. & G. 271.

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was held good, as amounting to a parliamentary declaration of the parties who were to hold it; although the award would have been bad as a common law conveyance, since surveyors of the highways are not a corporate body. The lord of the manor in whom the fee of the soil was vested was held to be a trustee for the surveyors for the time being as to the herbage (*u*).

Effect of the award on Infants.

IV. *Effect of an award on the parties and strangers.*]—As an examination of the effect of an award on parties and others occupies many pages elsewhere in this work, we must refer to them for an exposition of the effect of an award on infant parties (*x*), on corporations and corporate property (*y*); on parties added on the reference of a cause, and on those who have in fact become parties by acquiescence in the reference (*z*); on agents (*a*), or attornies (*b*), who have referred matters respecting their principals' interests; on executors, both when themselves parties to references relating to their testator's estate, and when only interested as representing a deceased party to the submission (*c*); on trustees (*d*), or assignees of bankrupts and insolvents (*e*); on public officers, in whose name by statute a company are to sue and be sued (*f*); and on those who are strangers to the submission (*g*).

Corporations.

Parties added.

Agents. Attornies.

Executors.

Trustees. Assignees. Public officers. Strangers to submission.

(*u*) Johnson v. Hodgson, 8 East, 38.

(*x*) See P. 1, ch. 2, s 1, d. 4, p. 24; P. 3, ch. 4, s. 1, d. 2

(*y*) Att. Gen. v. Clements, 1 Turn. & R. 58. See P. 1, ch. 2, s. 1, d. 6, p. 28; P. 3, ch. 4, s. 3, d. 1, charitable corporations; P. 3, ch. 6, s. 1, d. 3, attachment against corporations.

(*z*) See P. 1, ch. 2, s. 1, d. 7, p. 29; P. 3, ch. 4, s. 1, d. 2, stranger consenting to award.

(*a*) See P. 1, ch. 2, s. 2, d. 1, p. 30.

(*b*) See P. 1, ch. 2, s. 2, d. 2, p. 32.

(*c*) See P. 1, ch. 2, s. 2, d. 4, p. 36, reference by executors; P. 3, ch. 6, s. 1, d. 3, liability to attachment; P. 2, ch. 3, s. 3, d. 8, p. 165, liability party dying.

(*d*) See P. 1, ch 2, s. 2, d. 5. p. 39.

(*e*) See P. 1, ch. 2, s. 3, d. 1, p. 40.

(*f*) See P. 1, ch. 2, s 2, d. 7, p. 39; Corpe v. Glyn, 3 B. & Ad. 801.

(*g*) See P. 2, ch. 8, s. 4, p. 425; P. 3, ch. 4, s. 1, d. 2, liability of stranger in equity; P. 3, ch. 3, s, 5, d. 3, award as evidence affecting strangers.

Where the defendant had been arrested, a reference of the cause on the trial (a juror being withdrawn by consent) was held not to entitle the defendant to be discharged out of custody at the plaintiff's suit even after the award was made; since, as neither the submission by rule of court, nor the award, made any provision for his discharge, the intention of the arbitrators seemed to be that all things should remain in statu quo until the award was performed (*h*).

Award no discharge of defendant from arrest.

In one instance, where, after an award made, the plaintiff proceeded in the cause referred and obtained a verdict, the court refused to set aside the verdict, and left the defendant to his remedy by action on the arbitration bond (*i*).

Proceeding with cause after award.

If a party, pending a reference, assign his contingent right under the award, and after an award in his favor, receive the sum awarded from his opponent, an action for money had and received will lie against him at the suit of the person to whom he has assigned his claim; and if the one who has parted with his interest pay the arbitrator's charges on taking up the award, and receive from the party against whom the award has been made, not only the sum awarded, but also that amount of the costs of the award for which the latter is made liable, the amount of the costs so paid over, as well as the sum awarded, may be recovered by the assignee in the same action (*k*).

Assigning contingent right before award made.

The effect of the award on the arbitrator, whether it gives him a right to remuneration (*l*), and what liability it may impose on him in respect of directions contained in it (*m*), or in respect of money or chattels deposited with him to abide his decision (*n*), is examined in the concluding chapter of the previous part.

Effect of award on the arbitrator.

VII. *Effect of an award on a party bankrupt.*]—The validity of the award is not necessarily affected by a party, after

Award not avoided by bankruptcy of a party.

(*h*) Apsley v. Crosley, Barnes, 54.
(*i*) Potter v. Day, Pract. Reg. C. B. 47.
(*k*) Smith v. Jones, 1 Dowl. N. S. 526.
(*l*) See P. 2, ch. 9, s. 1, p. 434.
(*m*) See P. 2, ch. 9, s. 2, d. 2, p. 438.
(*n*) See P. 2, ch. 9, s. 2. d. 3, p. 439.

entering into the submission, becoming bankrupt before the execution of the award (*o*); but it may, nevertheless, be enforced by action (*p*), by attachment (*q*), by entering up judgment and issuing execution in the cause referred (*r*), as in other cases.

Effect of Bankrupt and Insolvent Acts on award of a debt.

If, however, nothing but the question of the liability of a party to a debt, or of the amount of a debt owing by him, be referred, and he afterwards become bankrupt, and obtain his certificate, or be discharged under the Insolvent Debtors' Act, the fact of the arbitrator having awarded against him cannot preclude him from claiming the benefit of the statutes of Bankruptcy or Insolvency, to relieve himself from liability in respect of all debts from which, had there been no reference, the statutes would have protected him. In such case the award will be set aside (*s*), or if the bankrupt have been taken on an attachment before he has obtained his certificate, he will, after obtaining it, be entitled to be discharged out of custody (*t*).

On costs not provable.

But if the award, besides ordering the payment of a debt from which the bankrupt is protected by the certificate, also direct him to pay costs from which he is not so protected, the award will be enforced against him as to the costs (*u*).

Sum awarded good petitioning creditor's debt.

An award of a sum certain creates a debt which is provable under a commission of bankruptcy, and is a good petitioning creditor's debt (*x*).

Penalty in arbitration bond good petitioning creditor's debt.

When a party fails to perform the award, the arbitration bond being forfeited, the penalty becomes a debt sufficient until the award be set aside, as a petitioning creditor's debt, to support a commission of bankruptcy. The mere filing a

(*o*) See P. 2, ch. 3, s. 3, d. 4, p. 157, revocation by bankruptcy.

(*p*) Tayler v. Marling, 2 M. & G. 55.

(*q*) Hemsworth v. Brian, 1 C. B. 131. See P. 3, ch. 6, s. 3, d. 3, showing cause against attachment.

(*r*) Andrews v. Palmer, 4 B. & A. 250. See P. 3, ch. 8.

(*s*) R. v. Bingham, 2 Tyrw. 46.

(*t*) R. v. Davis, 9 East, 317; Baker's Case, 2 Stra. 1152.

(*u*) R. v. Davis, 9 East, 317; Haswell v. Thorogood, 7 B. & C. 705.

(*x*) Antram v. Chace, 15 East, 208.

bill in Chancery to impeach the award will not suspend its effect, or make the debt insufficient (*z*).

VIII. *Effect of an award on the attorney's lien for costs.*] —The attorney of the plaintiff in the cause referred has a lien for his costs upon a sum awarded to the plaintiff as he has upon a sum recovered by verdict and judgment, and if, after notice of the lien, the defendant pay the money to the plaintiff, instead of to the plaintiff's attorney, the latter may compel a repayment to himself by summary application to the court, and he will not be prejudiced by a collusive release from the plaintiff to the defendant (*a*).

Attorney's lien on sum awarded.

Enforcing lien by rule of court.

An arbitrator awarded that the plaintiff had no claim on the defendant in the action, but ordered a third person, party to the reference, to pay the plaintiff a sum of money and the costs of the reference. The plaintiff having subsequently become a bankrupt, his attorney, who claimed a lien for his costs on the sum awarded, applied for a rule calling on the third party to pay him the amount, the latter having declined to do so, as the bankrupt's assignee would not sanction the payment. The court refused the motion on the ground that as such a rule would, under the 1 & 2 Vict. c. 110, s. 18, have the conclusive effect of a judgment, it would not be granted unless the claim were free from all doubt, which the court did not consider it to be in the case before them (*b*).

Not unless claim free from doubt.

If an uncertificated bankrupt bring an action for work done by him subsequent to his bankruptcy, his attorney, if the action be referred, has a lien for his costs of the action and reference on the amount awarded to the bankrupt paramount to the claim of the assignees: and if in consequence of a claim by the assignees the defendant refuse to pay the amount to the bankrupt, and an action be commenced in the bankrupt's name on the award, the defendant may obtain an

When lien paramount to claim of assignees of party bankrupt.

(*z*) Lingood, Ex parte, 1 Atk. 240.

(*a*) Ormerod v. Tate, 1 East, 464; Symonds v. Mills, 8 Taunt. 526.

(*b*) Holcroft v. Manby, 2 D. & L. 319.

interpleader rule calling on the assignees to contest their right as against the attorney (*c*).

Set-off of cross sums awarded, subject to attornies' lien.

The ninety-third rule of H. T. 2 Wm. IV. (*d*), which provides that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted," is quite unqualified in its terms, and embraces causes referred as well as causes which are pursued to their legal result in court (*e*).

Practice before the new rules.

Previous to this rule the practice of the courts did not coincide. In the Common Pleas, where an arbitrator awarded the costs of a nonsuit to be paid by the plaintiff, and a larger sum in respect of matters not in the cause to be paid as a debt by the defendant, the plaintiff was held entitled without motion to a set-off, without regard to the lien of the defendant's attorney. In the other courts the lien of the attorney was treated as paramount to the equitable claims of the parties against each other (*f*).

Decision since the new rules.

Since the rule of H. T. 2 Wm. IV. the Court of Exchequer made absolute a rule for setting off the defendant's costs in an action referred and found for him against a larger sum awarded to the plaintiff for matters out of the cause, but added the proviso that the set-off should be subject to the lien of the plaintiff's attorney for his costs (*g*).

Setting off cross judgments.

Where cross actions were referred and the arbitrator directed judgment for a certain sum for the respective plaintiffs in each, the court refused to allow one judgment to be set-off against the other without first satisfying the attorney's lien (*h*).

(*c*) Jones v. Turnbull, 2 M. & W. 601.

(*d*) Reported 3 B. & Ad. 388.

(*e*) Cowell v. Betteley, 10 Bing. 432. See Figes v. Adams, 4 Taunt. 632.

(*f*) Figes v. Adams, 4 Taunt. 632.

(*g*) Caddell v. Smart, 4 Dowl. 760.

(*h*) Domett v. Hellyer, 2 Dowl. 540.

IX. *Effect of an award under the various kinds of submissions.*]—The effect of an award, so far as it depends on the character of the submission, whether that be by parol (*i*), by agreement not capable of being made a rule of court (*k*), by agreement under the statute of William the Third (*l*), whether it be made in a court of common law (*m*), or in a suit by order of equity (*n*), has been previously considered in treating of the respective classes of submissions; it is sufficient, therefore, in this place, merely to advert to the respective sections and divisions indicated in the notes for further information on this particular.

Effect of award on submission by parol. By agreement. Under the statute. On an action. In a suit.

The various modes of obtaining the benefit of the award by action at law (*o*), or suit in equity (*p*) founded upon it; by pleading it (*q*), or producing it in evidence (*r*) to defeat an action or suit; by attachment (*s*); by execution under the statute of 1 & 2 Vict. c. 110, s. 18 (*t*); by judgment and execution in the cause referred (*u*); are fully considered in subsequent chapters.

Various modes of enforcing awards. By action or suit. By attachment. By execution under the statute or in the cause.

X. *Effect of awards under particular statutes.*]—In order to ascertain the effect of an award made under a statute, reference must be had to the particular provisions of the Act in question in each case.

Award by statute.

Much, however, has already incidentally been stated concerning the effect of awards made under the statutes relating to Bankrupts and Insolvents (*x*), to Savings' Banks and Friendly Societies (*y*), to Masters and Workmen in trades

Bankrupts. Insolvents. Savings' Banks. Friendly Societies. Masters. Workmen.

(*i*) See P. 1, ch. 3, s. 2, d. 1, p. 53.
(*k*) See P. 1, ch. 3, s. 2, d. 2, p. 54.
(*l*) See P. 1, ch. 3, s. 3, d. 1, p. 57.
(*m*) See P. 1, ch. 3, s. 6, dd. 4, 10, pp. 77, 89.
(*n*) See P. 1, ch. 3, s. 7, d. 1, p. 90.
(*o*) See P. 3, ch. 3, s. 1, p. 484.
(*p*) See P. 3, ch. 4, s. 1.
(*q*) See P. 3, ch. 3, s. 3, pleading award at law; P. 3, ch. 4, s. 2, pleading award in equity.
(*r*) See P. 3, ch. 3, s. 5.
(*s*) See P. 3, ch. 6.
(*t*) See P. 3, ch. 7.
(*u*) See P. 3, ch. 8.
(*x*) See P. 1, ch. 2, s. 3, d. 1, p. 40; P. 1, ch. 3, s. 7, d. 2, p. 91.
(*y*) See P. 1, ch. 1, s. 1, d. 2, p. 10; P. 1, ch. 2, s. 3, d. 2, p. 42; P. 1, ch. 3, s. 7, d. 8, p. 98.

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and manufactures (*z*), and concerning the Lands of Ecclesiastical and Collegiate Corporations (*a*), and the expenses of the keep of Prisoners in County Gaols (*b*). In the same manner allusion has been made to the effect of awards under "The Lands Clauses Consolidation Act, 1845," "The Railways Clauses Consolidation Act, 1845," and "The Companies Clauses Consolidation Act, 1845" (*c*).

Ecclesiastical, &c., Corporations. Prisoners' expenses. Lands, Railways, and Companies Clauses Acts. Inclosure Acts.

The effect of awards under Inclosure Acts to give a title to lands has been recently discussed in the preceding pages (*d*).

Alteration in award by the court

XI. *Effect of altering an award.*]—The court has no power to alter or amend the award (*e*).

By the arbitrator.

We have previously seen that after executing the award the arbitrator himself cannot alter its terms, and that his substituting one sum for another in the amount awarded, after the award has been completed, is of no effect whatever any more than an obliteration or cancellation by accident (*f*).

By a party.

A material alteration by a party interested in the award would probably have a much more serious effect, and might avoid the instrument altogether (*g*).

By a stranger.

Where there was a mistake in the recital of the umpirage in the Christian name of one of the arbitrators who appointed the umpire, an alteration made by a stranger subsequently to the publication of the award by striking out the wrong and inserting the right Christian name, the court held, did not vitiate the award, but left it in the state in which it was

(*z*) See P. 1, ch. 1, s. 1, d. 2, p. 9; P. 1, ch. 2, s. 3, d. 5, p. 46; P. 1, ch. 3, s. 7, d. 8, p. 97.

(*a*) See P. 1, ch. 2, s. 3, d. 4, p. 46.

(*b*) See P. 1, ch. 2, s. 3, d. 6, p. 47; P. 1, ch. 3, s. 7. d. 8, p. 97.

(*c*) See P. 1, ch. 1, s. 1, d. 2, p. 8; P. 1, ch. 2, s 3, d. 3. p. 45; P. 1, ch. 3, s. 7, d. 7, p. 93.

(*d*) See d. 5, of this chapter, p. 462. See also ante, p. 8.

(*e*) Hall v. Alderson, 2 Bing. 476; Wood v. Duncan, 7 Dowl. 91; Moore v. Butlin, 7 A. & E. 595.

(*f*) Henfree v. Bromley, 6 East, 308. See P. 2, ch. 3, s. 1, d. 3, p. 134.

(*g*) Henfree v. Bromley, 6 East, 308; Pigot's Case, 11 Rep. 27, a.

before the alteration, the mistake being immaterial. The court, however, added, that if the alteration had been made in any material part it would have been fatal (*h*). In an earlier case, however, just cited, where the alteration by the arbitrator, though in a material point, was treated simply as nugatory, it was likened to a spoliation by a stranger, as if that were simply void (*i*).

Material alteration.

XII. *Effect of a defective award.*]—The second part of this work has fully treated of the effect of an award which leaves a matter in difference brought before the arbitrator undisposed of (*k*), or which decides conditionally (*l*), or in the alternative (*m*), or which delegates the decision to another, or reserves it for the future determination of the arbitrator (*n*), or which is deficient in certainty and particularity (*o*), or which is repugnant and inconsistent (*p*), or which is founded on a mistake either apparent on the face of the award or not (*q*), or which contains directions which the arbitrator has no power to order (*r*).

Award not final.

Conditional

Alternative.

Delegating or reserving authority.

Uncertain.

Repugnant.

Mistaken.

Exceeding authority.

How awards open to any of the above objections are to be dealt with, to what extent they invalidate the award (*s*), and in what cases defects in the award may be taken advantage of by plea or demurrer (*t*), by giving them

Consequences of defects in award.

Taking advantage of defects by

(*h*) Trew v. Burton, 1 C. & M. 533.

(*i*) Henfree v. Bromley, 6 East, 308.

(*k*) See P. 2, ch. 5, s. 4, d. 2. p. 252; P. 2, ch. 6, ss. 1, 2, 4, 5, as to a cause; P. 2, ch. 7, as to costs.

(*l*) See P. 2, ch. 5, s. 4. d. 8, p. 268.

(*m*) See P. 2, ch. 5, s. 4, d. 9, p. 270.

(*n*) See P. 2, ch. 5, s. 4, dd. 10, 11, p. 271, 274.

(*o*) See P. 2, ch. 5, s. 5, p. 277; P. 2, ch. 7, s. 1, d. 3, p. 373, as to costs; P. 2, ch. 8, s. 2, d. 3, p. 418, as to act to be done.

(*p*) See P. 2, ch. 5, s. 7, p. 291.

(*q*) See P. 2, ch. 5, s. 8, p. 295.

(*r*) See P. 2, ch. 5, s. 9, p. 316; P. 2, ch. 6, s. 3, d. 3, p. 354, as to entering a verdict; P. 2, ch. 6, s. 5, p. 362, as to entering or arresting judgment; P. 2, ch. 7, s. 1, dd. 2, 3, pp. 371, 373, as to costs; P. 2, ch. 8, s. 1, p. 395, as to the satisfaction awarded; P. 2, ch. 8, s. 4, p. 425, as to strangers to the submission.

(*s*) See P. 2, ch. 5, s. 9, p. 316, award bad in part good for rest; P. 3, ch. 9, s. 7, d. 1, setting aside award in part.

(*t*) See P. 3, ch. 3, s. 4.

plea, demurrer, or evidence. By motion to set aside award.

in evidence in an action (*u*), or by alleging them as grounds for a motion to set aside the award (*x*), is amply set forth in the later chapters of this part.

(*u*) See P. 3, ch. 3. s. 5, d. 4. (*x*) See P. 3, ch. 9.

CHAPTER II.

PERFORMANCE OF THE AWARD.

How the award is to be performed forms the subject of the present chapter.

Contents of the second chapter.

The first section shows generally what sort of performance is required; the second is confined to an examination of the proper mode of compliance with an award directing the execution of a deed, such as a conveyance or a release.

SECTION I.

WHAT A SUFFICIENT PERFORMANCE OF THE AWARD.

Performance within a reasonable time.

An award is to receive a liberal and sensible construction, and as far as possible to be governed by the intent of the arbitrator; therefore, if the arbitrator award a thing to be done, without saying within what time, the party shall have a reasonable time, because it must be presumed that the

arbitrator intends all things necessary to the doing the thing he directs; and a reasonable time is necessary (*a*).

Performance at several times.

Though an award cannot be made part at one time and part at another, yet it may be performed part at one time and part at another; for the nature of the thing may require performance at different places and times (*b*).

Each party is bound to perform the award, and to comply with its directions, as far as regards himself.

Party bound to take notice of award.

As the making the award is as much within the knowledge of one as of the other, no notice of its being made is necessary to impose the duty of obedience (*c*).

Stakeholder not bound to take notice of award.

But if money or another chattel be deposited in the hands of a stakeholder to abide the award, it is not his duty to take notice of the award, but he should retain the property in his possession until the arbitrator's judgment has been communicated to him (*d*).

Party must obey award substantially.

The party directed to do any act must substantially comply with the requisitions of the award.

Award to pay money to wife.

In an action by a husband and wife (the husband being made a party unwillingly) respecting the right of the wife to an annuity, the award ordered the arrears of the annuity to be paid to the wife; it was held to be no answer to an attachment for non-payment to her that her husband had previously demanded them, and that they had been paid to him, it being evident that the payment to the husband was clearly collusive, and it having been known to the party in default that it was intended by all parties that the wife should enjoy the fruits of the action if the decision were in her favor (*e*).

To keep drain cleansed.

An award by commissioners under an Inclosure Act directed that the owners of lands over which a certain drain passed should cleanse and keep the same of a sufficient width and depth to carry off the water "intended to run

(*a*) Bac. Ab. Arb. F. Freeman v. Bernard, 1 Salk. 69.
(*b*) Bac. Ab. Arb. F.
(*c*) Child v. Horden, 2 Bulst. 143; Gable v. Moss, 1 Bulst. 44; Archb. Pl. & Ev. 90, 2nd Ed.; Bell v. Twentyman, 1 Q. B. 766.
(*d*) Wilkinson v. Godefroy, 9 A. & E. 536.
(*e*) Wynne v. Wynne, 4 M. & G. 253; S. C. 1 Dowl. N. S. 723.

down the same." The occupier of a close by which the drain passed, and whose lands were drained by it, subsequently, for the better draining of his lands, opened a sough or under-drain into the awarded drain. It was held that this method of draining not being contemplated by the award, the owner of land lower down, across which the drain ran, was not bound to keep the awarded drain of sufficient capacity to carry off the additional water which was poured into it by the sough (*f*).

Party must comply as far as is lawful and possible.

The award must be performed by the parties as far as they lawfully can; and if several matters be directed to be done, all within the arbitrator's power to order, it is no answer to an attachment for non-performance of the award that as to one of the matters it is out of the party's power to do it, or that compliance would subject him to an action, if he have done nothing to show his willingness to obey the award.

Award to remove weirs.

Hence, where an umpire directed a defendant to prostrate some weirs of which he was a proprietor, and also another weir in which he had only a share, and then said he made his award only to extend so far as any right or interest the defendant possessed, it was held by the court that it was the defendant's duty to obey as far as he could, and that if he could not remove his share of the latter weir without being liable to an action for trespass, that would be an answer to that part of the award (*g*).

To reinstate premises pulled down.

If an award direct a party to reinstate premises which he has wrongfully pulled down, and to restore them exactly as before would be a violation of the provisions of a Building Act passed subsequent to their original erection, the party is bound, under the order to reinstate, to erect the premises anew, but in conformity with the provisions of the statute, the increased expense of such erection having been cast upon him by his own conduct (*h*).

To dig for coal.

Where the lessees of some lands and coal-mines found or

(*f*) Sharpe v. Hancock, 7 M. & G. 354.

(*g*) Doddington v. Bailward, 7 Dowl. 640.

(*h*) Doddington v. Hudson, 1 Bing. 410.

to be found, covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary, and immediately to erect such fire-engines as should be necessary; an award ascertaining the damages occasioned by their default to do so further directed, that the lessees should sink to and through the coal-mines demised, and erect fire-engines thereon ready and complete for working the mines and getting the coals according to the terms of the lease before a certain day; it was held that they had sufficiently performed the award on their showing that they had sunk for coal as far as they could and ought in the judgment of persons of competent skill in such works, and as far as was usual and customary in such cases, and that no coal could be got worth working (*i*).

Party to pay must tender money.

Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money at the time and place, even if the other party be not there to receive it (*k*).

Must seek out party entitled.

A sum directed by an award to be paid for arrears of rent of a house is a sum in gross payable without demand, and the party directed to pay must seek out him who is to receive it(*l*).

Must get costs taxed.

So where the award orders the defendant to pay the plaintiff on a specified day his costs of suit, to be taxed by the proper officer, it is incumbent on the defendant to procure them to be taxed ready for payment on the day (*m*).

When not paying rent a breach of award.

If the arbitrators award that the defendant shall "enjoy a house paying rent to the plaintiff," the arbitration bond is forfeited if the defendant fail in the payment. The payment of the rent is not a mere condition, on non-performance of which the estate of the defendant is to cease (*n*). But if the award be that one shall make a lease for years to the other, rendering certain rent to the lessor; and the lessor make the

(*i*) Hanson v. Boothman, 13 East, 21.

(*k*) Doyley v. Burton, 1 Lord Raym. 533.

(*l*) Furser v. Prowd, Cro. Jac. 423.

(*m*) Candler v. Fuller, Willes, 62.

(*n*) Parsons v. Parsons, Cro. Eliz. 211.

lease, but the rent be not paid, the non-payment of the rent is no breach of the arbitration bond, but distress or an action of debt for the rent are the proper remedies. If, however, the award direct the lessee to pay the rent the bond is forfeited by non-payment (*o*).

When proceeding in suit a breach.

An award directing all suits between A. & B. to cease is not broken by A. prosecuting a suit against B. and others jointly (*p*).

Entering continuance.

An award that the plaintiff should not prosecute nor proceed in an action in the same term, was held not to be broken by the entry of a continuance from term to term, for without such entry the party could never afterwards have gone on with his action (*q*). If the award be that he shall not continue the action, it is a breach if he continue it by attorney, but not so if the attorney enter the continuance without his privity (*r*).

By attorney.

The court has no power to order an award to be delivered up to be cancelled on paying the amount awarded (*s*).

SECTION II.

PERFORMANCE OF AN AWARD DIRECTING THE EXECUTION OF A DEED.

Whether request to execute the deed necessary.

Where the arbitrator directed that on payment of the mortgage debt the mortgagee should re-assign the mortgaged land, the duty of re-assigning was held to attach, without any request from the mortgagor. And this distinc-

(*o*) Anon. F. Moore, 3, pl. 8.
(*p*) Barnardiston v. Fowler, 10 Mod. 204.
(*q*) Gray v. Gray, Cro. Jac. 525.
(*r*) Gray v. Gray, Cro. Jac. 525.
(*s*) Symonds v. Mills, 8 Taunt. 526.

tion was taken by the court, that no request was necessary, because the re-assignment might have been made without the presence of both parties, but that it would have been otherwise had the duty been to re-infeoff, because the intended feoffee must have been present to receive the livery (*a*).

Who to prepare and tender the conveyance for execution.

When the award orders conveyances of real or personal property, difficulties often arise as to which of the parties is to prepare and bear the expense of the instruments, and tender them for execution.

In an old case it is said, if a man be awarded to convey an estate to another person by such a time, he is to procure the conveyances to be made; or to convey an estate to another by such conveyances as shall be approved of by such a counsel, he is certainly to prepare the conveyances, and to procure them to be approved of by that counsel (*b*).

In a modern instance, where the award directed the lessor of the plaintiff to pay the defendant a certain sum for a piece of copyhold land, and that the defendant, in consideration of that sum, should, at the costs and charges of the former, surrender the land to his use, and that on such surrender being made and delivered to him, he should pay the defendant the price awarded; it was decided by the court that it was the defendant's business to prepare and execute the surrender, or at all events to give notice that she would attend on the steward of the manor to make it. It was proved that the defendant was requested to make the surrender, and that an offer was made to pay the price awarded, and the costs of the surrender, upon the surrender being effected by the defendant: and the court granted an attachment against her (*c*).

It being referred to an arbitrator to decide whether a contract subsisted for the purchase of some land, and the award found that the contract was in force, and directed the de-

(*a*) Rosse v. Hodges, 1 Ld. Raym. 233.

(*b*) Candler v. Fuller, Willes, 62.

(*c*) Doe d. Clarke v. Stillwell, 8 A. & E. 645.

fendant to perform it, and to pay a certain sum on the conveyance of the land by the plaintiff to him, it was held that in order to bring the defendant into contempt for non-performance, the plaintiff should have executed and tendered a conveyance to the former, and asked for the money (*d*).

Both this case and the preceding one (*e*) were decided on what was supposed to be the general rule respecting the duty of a vendor on a contract for sale, to prepare and tender the conveyance for the execution of the vendee. But it seems from the last edition of Sir Edward Sugden's work on Vendors and Purchasers, that that rule, which never was sanctioned by the practice of conveyancers, has ceased to be law.

Ordinary rule on a contract for sale of lands.

The effect of what is there stated may be thus abridged; When the contract for sale of lands is silent respecting the preparation and costs of the conveyance, it seems now to be settled law, notwithstanding ancient cases, and many dicta to the contrary, that it is the duty of the purchaser, at his own expense, to prepare and tender the conveyance to the vendor for execution. If the agreement expressly require the purchaser to prepare and bear the expense of the conveyance it was always clear that the vendor need not tender a conveyance. But when the conveyance is to be prepared at the expense of the vendor, and there is nothing in the agreement to show who is to prepare it, it has been decided that the duty of preparing, as well as paying for the instruments, falls on the vendor (*f*).

Deed tendered should be drawn according to award.

Very often the direction in the award is to assign upon request. When such is the case, the instrument, of which execution is requested, should precisely agree with the terms of the award, or refusal to execute it would probably be no breach.

An award directed the defendant to assign, according to

(*d*) Standley v. Hemmington, 6 Taunt. 561.

(*e*) Doe d. Clarke v. Stillwell, 8 A. & E. 645.

(*f*) Sugd. Vend. & Purch. vol. 1. p. 262, 11th Ed. See the cases there cited.

law, a certain interest to one Duncan, upon request. The assignment tendered to the defendant for execution was an assignment to Duncan, his executors, administrators, and assigns; it was objected that the assignment tendered was too large in its terms, and Lord Ellenborough was inclined to think a personal assignment to Duncan himself might be meant; the case, however, was ultimately compromised (*g*).

Demanding execution by agent.

If an arbitrator direct a party to execute a deed, it is no excuse for non-performance that the deed was tendered for execution by a person not authorized by power of attorney to make the demand. It is sufficient if the person presenting the instrument were authorized so to do, and an attachment will issue on refusal. Demanding payment of money awarded is considered by the court to stand on a very different footing from demanding execution of a deed (*h*).

Award to execute release on payment.

If one party be ordered to pay a sum of money, and the other, on the receipt thereof, to execute a release, the latter, by refusing the sum, cannot free himself from his liability to perform the award, but must execute the release on the money being tendered to him (*i*).

Death of party before payment.

If the award direct payment to be made to a party or his assigns within a specified period, and that on the payment each party should give the other a release, and the party who is to receive the money die before the time has expired, payment must be made to his personal representative, though not named in the award, and the representative is bound to give a release of all demands the deceased has against the other (*k*).

Award of release to time of award.

Where an arbitrator exceeds his authority in awarding a release of all claims until the time of the award, instead of

(*g*) Russell v. Headington, 1 Stark. 13.

(*h*) Kenyon v. Grayson, 2 Smith, 61.

(*i*) Squire v. Grevett, 2 Ld. Raym. 961; Linnen v. Williamson, Rolle, Ab. Arb. K. 16, p. 254; Lumley v. Hutton, Cro. Jac. 447; Simon v. Gavil, 1 Salk. 74.

(*k*) Dawney v. Vesey, 2 Vent. 249.

limiting it to the date of the submission, if the party execute a release to the time of the submission, this is a good performance of the award (*l*).

Delivering release to stranger for plaintiff's use.

If the defendant, being ordered to execute a release to the plaintiff, deliver a release properly executed to a stranger, to the use of the plaintiff, which the latter refuses to accept, such tender and refusal may be pleaded as a good performance of the award, if no particular place be mentioned for the delivery (*m*).

Award to execute indemnity.

If the arbitrator direct a party to execute a bond or covenant indemnifying another against the costs of an action, and the party execute the bond or covenant, the remedy on the arbitration bond is gone; and in case of a failure to save the party harmless, proceedings must be taken on the indemnity bond or covenant (*n*).

Award that plaintiff shall stand acquitted of a suit.

In debt on bond for non-performance of an award, "that a suit in chancery shall cease, and that the plaintiff shall stand acquitted of it," it is a sufficient plea that the defendant did not prosecute the suit, and that the plaintiff "staret inde quietus," for the award orders no act to be done by the party, but says that by virtue of the award he shall stand acquitted. The mere filing a fresh bill in Chancery for the same matter is no breach of the award, for until a subpœna issues on the bill the party is not damnified. But if one, being bound to save another harmless, obtain a process against him, this is a clear breach of the award (*o*).

Award to acquit of a debt.

On an award that one "shall acquit the other of such a debt or suit," it is not sufficient to save the latter harmless, but the party directed to acquit ought to procure an actual discharge (*p*). So if one has a rent-charge out of the lands of another, and as touching this they submit to an award, and the arbitrator award for the latter "quod staret quietus"

Award quod staret quietus of rent.

(*l*) Stevens v. Matthews, 1 Ld. Raym. 116; Marks v. Marriot, 1 Ld. Raym. 114.

(*m*) Alford v. Lea, 2 Leon. 110; S. C. Cro. Eliz. 54; Freeman v. Drew, 2 Leon. 181.

(*n*) Phillips v. Knightley, 1 Barnard. 463.

(*o*) Freeman v. Sheen, Cro. Jac. 339; S. C. 2 Bulst. 93; 1 Rolle Rep. 7.

(*p*) Freeman v. Sheen, Cro. Jac. 339; S. C. 2 Bulst. 93.

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of the rent, he who has the rent ought to release the same to the other, for to be quit of the rent supposes the demand not in being (*q*).

(*q*) Freeman v. Sheen, 2 Bulst. 93, per Doddrige, J.; Bac. Ab. Arb. F.

CHAPTER III.

THE AWARD AS A GROUND OF ACTION OR DEFENCE AT LAW.

Contents of the third chapter.

Of the various modes of enforcing awards, the most universal is that by action at common law. An award may either form the ground of an action, or may be used to resist a claim attempted to be asserted by action. Both these uses are considered in the present chapter.

The first section shows how to enforce an award by action, and the various kinds of actions available according to circumstances.

Section two points out how to state an award in pleading, with the necessary averments.

The effect of an award, when pleaded as an answer to a claim, is examined in the third section.

The fourth declares what sort of answer may be pleaded to defeat a claim, or invalidate a defence resting on an award pleaded by an opponent.

The fifth section, after discussing the mode of proof of the submission and award, investigates the effect of an award in evidence, as between the parties, and as regards strangers; and concludes by pointing out how an award put in evidence, may be impeached by evidence in reply.

SECTION I.

HOW TO ENFORCE AN AWARD BY ACTION.

An action lies to enforce award.

I. *An award a ground of action.*]—An award may be enforced as of right by action, whether the submission be by parol, by writing not under seal (*a*), by bond (*b*), or deed (*c*), by judge's order (*d*), order of Nisi Prius (*e*), rule of court (*f*), or order of equity (*g*).

When action only remedy.

An action is the only remedy at law for disobedience to the award, in cases where the submission cannot be made a rule of court, and no statute provides for a special mode of enforcement. In other cases, although the award be one over which the courts may exercise a summary jurisdiction, they will in general, if its validity be doubted, decline either to enforce it by attachment, or to set it aside, and will leave the parties to discuss the objections to it in an action (*h*). This observation of course only applies to objections which can be taken to it in an action, and therefore will not attach when the award is questioned on the ground of any alleged mistake or misconduct of the arbitrator, which we shall see further on cannot be pleaded or proved in an action (*i*).

Assumpsit lies when submission not under seal.

II. *Enforcing award by assumpsit.*]—Anciently it was considered that no action could be maintained on a submission not under seal, where the award directed the perform-

(*a*) Hodsden v. Harridge, 2 Saund. 62, b. n.

(*b*) Winter v. White, 3 Moore. 674; Ferrer v. Oven, 7 B. & C. 427.

(*c*) Tomlin v. Mayor of Fordwich, 6 N. & M. 594.

(*d*) Still v. Halford, 4 Camp. 17; Stalworth v. Inns, 13 M. & W. 466; Wharton v. King, 1 Moo. & Rob. 96.

(*e*) Bonner v. Charlton, 5 East, 139.

(*f*) Tremenhere v. Tresillian, 1 Sid. 452; Carpenter v. Thornton, 3 B. & A. 52.

(*g*) Dowse v. Coxe, 3 Bing. 20.

(*h*) Stalworth v. Inns, 13 M. & W. 466.

(*i*) Hall & Hinds, In re, 2 M. & G. 847. See post, s. 4, d. 3, p. 509; s. 5, d. 4.

ance of some collateral act, and not the payment of a sum of money, as, for instance, the executing a release. But even previous to the time of Holt, C. J., the law was laid down as it holds at present, that as every such submission implies mutual promises to perform the award, an action of assumpsit may be maintained for the breach of those promises, in case of non-performance, whether the award be to pay money or to do any other act (*k*).

For each instalment when due.

When money is awarded to be paid by instalments, assumpsit will lie for each sum as it becomes due, though debt cannot be sustained until the whole has become payable. If the submission be by bond, the penalty will be incurred by the first neglect in payment (*l*).

Against parties contracting jointly and severally.

Where A. and B. jointly and severally promised to perform the award, and the award directed A. to pay one sum, and B. another sum to the plaintiff, an action of assumpsit was held to lie against A. and B. jointly, on the ground that they were jointly liable for the sums awarded to be paid by each (*m*).

Against executors of deceased party.

A party dying pending a reference by order in equity, the arbitrator directed payment to be made by his executors out of his assets. It was held assumpsit lay against the executors (*n*).

In whose name action to be brought.

If pending a reference a party assign his contingent interest under the award, the assignee cannot sue on the award in his own name, but the action must be brought in the name of the original party (*o*). A party to whom the debts due to a firm are by deed assigned on certain trusts, with a power of attorney to receive and compound for the same, may enforce by action of assumpsit in his own name

(*k*) Hodsden v. Harridge, 2 Saund. 62, b. n.; Purslow v. Baily, 2 Ld. Raym. 1039; Tilford v. French, 1 Sid. 160; Squire v. Grevell, 6 Mod. 34; S. C. 2 Ld. Raym. 961; Lupart v. Welson, 11 Mod. 171.

(*l*) Cooke v. Whorwood, 2 Saund. 336, e.; Rudder v. Price, 1 H. Bl. 547; 1 Chitt. Pl. 103, 6th Ed.

(*m*) Mansell v. Burredge, 7 T. R. 352. See Genne v. Tinker, 3 Lev. 24; Johnson v. Wilson, Willes, 248; Duke of Northumberland v. Errington, 5 T. R. 522.

(*n*) Dowse v. Coxe, 3 Bing. 20.

(*o*) Day v. Smith, 1 Dowl. 460.

an award made on a submission between himself, as attorney of the firm, and a debtor to it, respecting matters in difference between the latter and the firm; nor need he make profert of the deed in his declaration, as it is pleaded merely by way of inducement (*p*).

Debt lies on award of money.

III. *Enforcing award by debt on the award.*]—As the effect of an award that one party should pay to another a specified sum of money, is to create a debt from the former to the latter, an action of debt for the money awarded might always have been maintained, although the submission were verbal, or by writing not under seal (*q*). At the present day an action of debt lies on an award for a sum of money awarded upon a submission, either by rule of court, or by deed, or by writing without deed, or by parol (*r*). Though besides awarding money to be due, the arbitrator direct the performance of collateral acts, an action of debt may be maintained for the money awarded (*s*).

By obligor of arbitration bond against co-obligor.

Six partners entered into two bonds of submission to arbitration: in the one three of them gave a joint and several bond to the other three, conditioned for the performance of the award, respecting all differences between the parties or any of them, and the three latter gave a similar bond to the three former. The arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. It was held that an action of debt on the *award* might be brought by the one against the other alone, though no action on the *bond* would lie by one co-obligor against another (*t*).

Against executor of deceased party.

Formerly it was held that debt did not lie against an executor, or an administrator, upon an award made on a sub-

(*p*) Banfill v. Leigh, 8 T. R. 571.

(*q*) Purslow v. Baily, 2 Ld. Raym. 1039.

(*r*) Hodsden v. Harridge, 2 Saund. 62, b. n.; Purslow v. Baily, 2 Ld. Raym. 1039.

(*s*) See form 2 Chitt. Pl. 258, 6th ed.

(*t*) Winter v. White, 3 Moore, 674; S. C. 1 B. & B. 350.

mission not under seal entered into by the deceased, on the ground that the latter might have waged his law, whereas the executor could not wage his law of a debt contracted by his testator (*u*). Now however, by the recent statute for amending the law, wager of law is done away, and an action of debt on simple contract is given against an executor or administrator (*x*).

Against executor party.

Where the submission was by the executor, and not the testator, debt on the award was held maintainable against the executor, even before the above statute (*y*).

Debt lies on the arbitration bond.

IV. *Enforcing award by debt on the arbitration bond.*]— If the submission be by bond, an action of debt for the penalty, in case of non-performance of the award, has always been maintainable. It is in some respects preferable to an action of debt on the award, since it throws upon the defendant the task of discharging himself from the penalty, by showing performance of the condition, and relieves the plaintiff from the burden of proving a mutual submission, which he must allege and prove if traversed, in order to support the latter form of action (*z*).

Preferable remedy.

Time in the condition enlarged by deed.

Where the original submission is by bond, though the time be enlarged by deed, an action for non-performance of the award may be maintained on the bond, for altering the condition does not defeat the bond (*a*). But if the time for making the award be enlarged by agreement not under seal, and the award be made beyond the original time, but within the substituted period, no action can be maintained on the bond, but an action of assumpsit may be brought on the new submission by enlargement, in case obedience to the award be withheld (*b*).

Enlarged by agreement, debt not lie.

(*u*) Hampton v. Boyer, Cro. Eliz. 557; Freeman v. Bernard, 1 Ld. Raym. 247; Bowyer v. Garland, Cro. Eliz. 600; Riddell v. Sutton, 5 Bing. 200; S. C. 2 M. & P. 345.

(*x*) 3 & 4 W. IV. c. 42, ss. 13, 14.

(*y*) Riddell v. Sutton, 5 Bing. 200.

(*z*) Ferrer v. Oven, 7 B. & C. 427.

(*a*) Greig v. Talbot, 2 B. & C. 179.

(*b*) Brown v. Goodman, 3 T. R. 592, cited in the notes.

Altering condition of recognizance by rule of court.

On the like principle, after an extent in aid had issued against the defendant, and the defendant had entered into a recognizance conditioned to abide by the award of A. B. respecting debts claimed to be due from him to the prosecutor, and, A. B. declining to act, by a rule of court a new arbitrator, C. D., was by consent substituted, and the latter made his award; the court held that a scire facias on the recognizance was not maintainable, since the defendant, by disobeying the award of C. D., had not forfeited the recognizance which was to abide by the award of A. B. (*c*).

Covenant lies when submission by deed.

v. *Enforcing award by covenant.*]—Where the submission is by deed, an action of covenant will lie for the breach of any part of the award, though debt will lie only for the non-payment of money (*d*).

Revocation and non-performance breach.

In covenant against a woman and her husband, the declaration alleged that she, before her marriage, covenanted to abide by and perform an award, and protesting that she did not before her marriage observe her part of the indenture, averred that after the making the indenture, and the intermarriage of the defendants, the arbitrator made his award, directing her to pay a sum of money. It then laid as a breach, that the defendants did not pay the sum. On motion in arrest of judgment, on the ground that the marriage of the female defendant was a revocation of the arbitrator's authority, and consequently that the award was void, and that therefore there could be no breach of covenant; the court held, that although the plaintiff had alleged his real grievance, viz. the revocation by the marriage, informally, and in a manner bad on special demurrer, yet as the fact of the marriage before the award, which constituted a breach, appeared on the face of the declaration, there was sufficient to justify the court in giving judgment for the plaintiff (*e*).

(*c*) R. v. Bingham, 1 Tyrw. 262; S. C. 3 Y. & J. 101.

(*d*) Tomlin v. Mayor of Fordwich, 6 N. & M. 594; Charnley v. Winstanley, 5 East, 266; Marsh v. Bulteel, 5 B. & A. 507; 2 Chitt. Pl. 255, notes, 6th Ed.

(*e*) Charnley v. Winstanley, 5 East, 266. See Le Bret v. Papillon, 4 East, 502.

But in covenant to abide by and perform an award, and not prevent the arbitrator from making an award, where the declaration alleged an award, and laid the breach in non-performance of it, and the defendant pleaded that he had revoked the arbitrator's authority before the award was made; the defendant, on demurrer, was held entitled to judgment, since the revocation defeated the claim on the award, and although a breach of covenant in itself did not entitle the plaintiff to recover, since a plaintiff can only recover in respect of some ground of action alleged in the declaration; and the court distinguished this case from the case of *Charnley* v. *Winstanley* (*f*), remarking that there the revocation appeared on the face of the plaintiff's count, here only in the plea (*g*).

Joining counts for revocation and non-performance.

Where the defendant has revoked his submission, and an award has notwithstanding been made, there seems to be no objection, in assumpsit, or covenant, on the submission, to join a count for the revocation with a count on the award; and the judge at Nisi Prius will not compel the plaintiff to elect on which count he will rely at the trial; and if the defendant prove the revocation in order to defeat the claim on the count on the award, the plaintiff will be entitled to damages on the other count (*h*).

Case for non-performance of duty awarded.

VI. *Enforcing award by action on the case.*]—Where commissioners under an inclosure act award that the owners or occupiers of lands, across which a particular drain runs, shall keep the portions of it which respectively lie on their several lands cleansed, and in a fit state to carry off the water, and one of the owners in question neglect to do so, an action on the case for the wrongful neglect seems to be a proper remedy for any other owner or occupier of land who has a right to the benefit of the drain, and who has been injured by the default (*i*).

(*f*) 5 East, 266.

(*g*) Marsh v. Bulteel, 5 B. & A. 507.

(*h*) Brown v. Tanner, 1 C. & P. 651; S. C. M'Lel. & Y., 464; Marsh v. Bulteel, 5 B. & A. 507.

(*i*) Sharpe v. Hancock, 7 M. & G. 354.

VII. *Points of practice in actions to enforce awards.*]—The venue in an action on an award cannot be changed on the common affidavit (*k*). Doubt was thrown upon this point by the observations of the court in a recent case (*l*), but a still later decision has expressly confirmed the old rule (*m*).

Changing the venue.

Affidavit of debt.

An affidavit of debt to hold a party to bail, which averred that the defendant was indebted to the plaintiff generally, on a bond conditioned for the performance of an award, which directed an apparent stranger to pay a sum of money on demand, was held to be defective, for not showing how the defendant was indebted, and also for not averring a demand on the stranger, and a refusal by him to pay (*n*). So where the award directed that a party should pay the expenses of the reference, and that the other should repay them on demand, and the former having paid them, made an affidavit of debt against the other, alleging such payment, but not stating any demand for repayment, the affidavit was held insufficient (*o*).

An affidavit for the above purpose ought to show the fact of the submission, the making of the award, and that the money was due at a day past at the time of the affidavit (*p*).

Interest recoverable on sum awarded.

Where money due on a balance of account is awarded to be paid at a particular time and place, if duly demanded there on the day, interest from that day may be recovered, together with the principal, in an action on the award (*q*). So where no particular time is mentioned, interest will run from the time the sum is demanded (*r*). Interest, however,

(*k*) Whitburn v. Staines, 2 B. & P. 355; Stanway v. Heslop, 3 B. & C. 9; 2 Archb. Pr. 958, 7th Ed.

(*l*) Mondel v. Steele, 8 M. & W. 640; Greenway v. Carrington, 7 Price, 564.

(*m*) Martin v. Daws, 1 D. & L. 279.

(*n*) Armstrong v. Stratton, 1 Moore, 110.

(*o*) Driver v. Hood, 7 B. & C. 494.

(*p*) Anon. 1 Dowl. 5.

(*q*) Pinhorn v. Tuckington, 3 Camp. 468. See 3 & 4 W. IV. c. 42, s. 28; Marquis of Anglesey v. Chafey, Manning's Digest, Title Interest, A. a. pl. 19, cited in Churcher v. Stringer, 2 B. & Ad. 777.

(*r*) Johnson v. Durant, 4 C. & P. 327.

can only be recovered in an action, and not on a motion for an attachment (*s*); or on an execution issued on a judgment entered up pursuant to the award (*t*), or on an execution under the statute 1 & 2 Vict. c. 110 (*u*).

Reference to the Master to compute principal and interest.

After interlocutory judgment in an action on an award for a sum certain, the court will refer it to the master to compute the amount of damages instead of directing a writ of inquiry (*x*).

Writ of inquiry after judgment on issue nul tiel record.

Leave was given to the plaintiff, in debt on bond conditioned to perform an award, after judgment for him upon an issue of nul tiel record to a plea of judgment recovered, to execute a writ of inquiry upon the statute 8 & 9 W. III. c. 11, s. 8, after a writ of error allowed, and to sign a new judgment on the terms of paying costs, and putting the defendant in statu quo (*y*).

SECTION II.

HOW TO STATE AN AWARD IN PLEADING.

Pleading award. Recital of differences.

1. *Averments in a pleading stating an award.*]—In the declaration in an action on an award, or in a plea relying on an award, it is usual by way of inducement to state concisely that certain differences had existed, and were depending between the parties (*a*). It is more common, though not necessary, to specify shortly the subject-matter of the dispute (*b*).

(*s*) Churcher v. Stringer, 2 B. & Ad. 777.

(*t*) Lee v. Lingard, 1 East, 400.

(*u*) Doe d. Moody v. Squire, 2 Dowl. N. S. 327.

(*x*) Meggison v. —, Tidd. Pr. 571, 9th Ed.

(*y*) Hanbury v. Guest, 14 East, 401.

(*a*) 1 Chitt. Pl. 290, 6th Ed.; 2 Chitt. Pl. 256, notes, 6th Ed. See the Appendix of Forms, for the forms of pleadings relating to awards.

(*b*) 2 Chitt. Pl. 145, 255, 6th Ed.

Of mutual submission.

There must be a statement of a mutual submission of the matters in difference to the award of the arbitrator. The submission need not to be set out at full length, or stated to be in writing, but the substance and legal effect of it ought to be given (*c*). It must appear to be valid and binding in law, or the award on it cannot be supported, and the pleading will be bad on demurrer (*d*).

Of appointment of arbitrator.

The arbitrator must be alleged to be nominated by the parties. Averring him appointed on their part and behalf is insufficient (*e*).

When the parties are bound by their submission, so as to incur peculiar liabilities, it is advisable to state the terms very fully, or to set the submission out verbatim (*f*).

Averment of mutual promises in assumpsit.

In *assumpsit*, on a submission by agreement not under seal, there must be an averment in the declaration of mutual promises to perform the award. These promises are implied from the fact of the submission (*g*). A plea of an award on a like submission should aver mutual promises in like manner.

Averment bad in debt.

But in *debt*, an averment in the declaration of mutual promises is bad on special demurrer, since it makes the action an action of debt to perform an award when made, and not an action of debt on the award itself. Such a declaration might plausibly be argued to be either in debt or assumpsit (*h*).

Averment award made pursuant to submission.

The award must appear on the face of the pleading to be made in pursuance of the submission as set forth, in all the formal requisites. It will not be sufficient to aver that it was duly made. If the submission, as pleaded, require the award

As to formal requisites.

to be in writing, or under the hand of the arbitrator, or under his hand and seal, or before two witnesses, it must be stated in pleading that the arbitrator made his award in

(*c*) 2 Chitt. Pl. 256, notes; Hodsden v. Harridge, 2 Saund. 61, m. notes, 61, n.

(*d*) Biddell v. Dowse, 6 B. & C. 255.

(*e*) Dilley v. Polhill, 2 Stra. 923.

(*f*) Mansell v. Burredge, 7 T. R. 352; 2 Chitt. Pl. 256, notes, 6th ed.

(*g*) Lupart v. Welson, 11 Mod. 171.

(*h*) Sutcliffe v. Brooke, 15 L. J. Ex. 118; S. C. 3 D. & L. 302.

writing, or under his hand, or under his hand and seal, or before two witnesses, as required (*i*).

As to time.

The award must be pleaded as made within the time limited. If the submission provide that it be made on or before a certain day, an allegation that the award was made (to wit) on the day named as the limit will be good even on special demurrer; for the averment of the day being material will not be rendered immaterial by being laid under a videlicet, but will be taken to be a positive and traversable statement that the award was made on the day specified (*k*).

Averring award ready to be delivered.

Though the submission require the award to be made on or before such a day, ready to be delivered to the parties, showing an award made on or before the day, is good, without any averment that the award was ready to be delivered; for when made, it will be intended to be ready to be delivered, and therefore it is not necessary to aver it: and if it were not in fact ready to be delivered, it has been said that in answer to an action on the award, the defendant should plead the matter specially (*l*).

A plea that the arbitrators had made their award, and that the defendant, on the last day for making the award, required them to deliver it to him, but that they had neglected and refused to do so, was held supported by evidence that the arbitrators had made their award on the day, but had refused to deliver it to the defendant as it was not stamped, and to entitle the defendant to a verdict in his favor in an action on the arbitration bond (*m*). He might, however, it

(*i*) Everard v. Paterson, 2 Marsh. 304; Henderson v. Williamson, 1 Stra. 116; Hinton v. Cray, 3 Keb. 512; Wilson v. Constable, 1 Lutw. 536.

(*k*) Skinner v. Andrews, 1 Saund. 169; S. C. 1 Lev. 245; S. C. 2 Keb. 361, 388; S. C. 1 Sid. 370; Bissex v. Bissex, 3 Bur. 1730; Bac. Ab. Arb. G.

(*l*) Rowsby v. Manning, 3 Mod. 331; S. C. Carth. 158, 1 Show. 98, 242; Doyley v. Burton, 1 Ld. Raym. 533; Anon. 2 Ld. Raym. 989; Busfield v. Busfield, Cro. Jac. 577; Freeman v. Bernard, 1 Ld. Raym. 247; Bradsey v. Clyston, Cro. Car. 541; Robison v. Calwood, 6 Mod. 82; Marks v. Marriot, 1 Ld. Raym. 114; Oates v. Bromhill, 6 Mod. 176; S. C. 1 Salk. 75; Jenkinson v. Allisson, 1 Freem. 415, contrâ; S. C. 3 Keb. 513.

(*m*) Wilson v. Wilson, cited in Veale v. Warner, 1 Saund. 327, c. note m.

is presumed, have given such special matter in evidence under a plea of no award (*n*).

The ordinary precedents usually contain an averment of readiness to deliver (*o*).

Award to be ready to be delivered at a particular place.

Where an award is to be ready to be delivered by a particular day, at a particular place, the cases are not quite agreed whether an averment that it was made elsewhere, ready to be delivered at the specified place, be sufficient (*p*). An averment that it was made and delivered to the parties before the day, at another place, has been held good (*q*).

Averring award made of and concerning the premises.

It is proper to state in pleading that the award was made "of and concerning the premises;" for when such averment appears, the court will intend that the arbitrator has decided all the matters referred, until the contrary be made manifest (*r*).

Showing directions in award authorized.

It must be shown also on the face of the pleadings that every direction of the award relied on as a ground of action is warranted by the terms of the submission set forth. For example, if a landlord, who has parted with his reversion, and has therefore by law no power to distrain, rely on an award giving him such a power, the arbitrator's authority to award a power to distrain must either appear by the express words of the submission, as set forth in the award, or else it must be brought within the general words of the submission by a distinct averment that the question as to whether the landlord should have such a power of distress, was one of the matters in difference between the parties (*s*).

When stating part only of award sufficient.

In an action on an award, the declaration need not show forth more of the award than is necessary to support the plaintiff's claim in the action, and it is sufficient to say that

(*n*) Dresser v. Stansfield, 14 M. & W. 822.

(*o*) 2 Chitt. Pl. 256, note, 6th Ed.; Veale v. Warner, 1 Saund. 327, b. n.

(*p*) Doyley v. Burton, 1 Ld. Raym. 533; Busfield v. Busfield, Cro. Jac. 577; Bac. Ab. Arb. G., p. 254, 5th Ed.

(*q*) Elborough v. Gates, 2 Lev. 68.

(*r*) Craven v. Craven, 7 Taunt. 642; Doyley v. Burton, 1 Ld. Raym. 533.

(*s*) Pascoe v. Pascoe, 3 Bing. N. C. 898; 2 Chitt. Pl. 256, notes, 6th Ed.

the arbitrator, "among other things," awarded the amount due; and if the award be defective on its face, or contain anything by way of condition precedent to the payment of the money, the defendant must set it out in his plea. But in an action on the arbitration bond, if the plaintiff set out the award in his declaration or replication, he must set out the whole, or at least every part that is not void, or there will be a fatal variance in the proof (*t*).

Part set out not deciding all matters.

Where a declaration in covenant, for not performing the award, stated that the arbitrator, *among other things*, directed the defendant to do certain acts, and then alleged a breach in respect of those directions; Lord Denman, C. J., intimated an opinion that he would not hold the award void, or the declaration bad on demurrer, although it appeared that the arbitrator had to award on a particular matter, unconnected with the alleged breach, on which matter the portion of the award set out did not decide. No decision, however, was come to on the question, the award being bad on its face on other grounds (*u*).

Pleading parol award.

In pleading a parol award, it is not necessary to set forth the exact words, it is sufficient to show the effect and substance of what was awarded by word of mouth (*x*).

Award under seal profert unnecessary.

An award, though indented under the hand and seal of the arbitrator, is no deed or specialty, but a writing under hand and seal, unless it be delivered by the arbitrator as a deed, and therefore it is not necessary in pleading to make profert of it (*y*).

Averring notice of award made.

It is usual in practice to aver that the defendant had notice of the award, but such an averment has been held

(*t*) Perry v. Nicholson, 1 Burr. 278: Leake v. Butler, Litt. 312; Smith v. Kirfoot, 1 Leon. 72; Wood v. Wilson, 2 C. M. & R. 241; Tilford v. French, 1 Sid. 160; Foreland v. Marygold, 1 Salk. 72; Bac. Ab. Arb. G.; Leach v. Morris, 1 Mod. 36, contrâ. See 2 Chitt. Pl. note (h), where it is said if there be a condition precedent to the payment of the money, it, and performance of it, should be averred in the declaration.

(*u*) Tomlin v. Mayor of Fordwich, 6 N. & M. 594.

(*x*) Hanson v. Liversedge, 2 Vent. 242; Thomlinson v. Arriskin, 1 Com. Rep. 329.

(*y*) Dod v. Herbert, Sty. 459; Perry v. Nicholson, 1 Burr. 278; Hodsden v. Harridge, 2 Saund. 62, b. n.

not to be necessary, unless the submission provide that notice of the award shall be given, because the defendant is bound to take notice of the award being made as well as the plaintiff (*z*).

Averring cause of action accrued before suit commenced.

If the award direct an act to be done on a particular day, as, for instance, that the defendant is to pay the plaintiff a sum of money on a specified day, and the non-performance of the act in question is the ground of action, it is prudent to aver that the day in question had elapsed before the commencement of the suit; for though, according to recent decisions, the courts will presume that the cause of action alleged in the declaration occurred before the suit issued, yet they will not in some cases set aside as frivolous a demurrer on the ground of the want of such an allegation (*a*).

Averring request to perform award.

Generally, if an award direct money to be paid, it is not necessary to state any request for payment in the declaration in an action on the award. But if the award be to pay a sum "on request," the declaration must allege an express request. The averment that the defendant, though often requested, has not paid, is insufficient (*b*).

When money to be paid at appointed time and place.

Ordering the money to be paid at a particular time and place, does not impose the necessity of alleging a request, for the defendant is still under a general obligation to pay; nor need the declaration in such case allege the attendance of the plaintiff at the place, or a demand by him there; the utmost necessary to be stated is, that the defendant did not pay at the time and place, or at any other time or place. Readiness to pay at the time and place is only matter of defence (*c*).

(*z*) Fraunce's case, 8 Rep. 92, b.; Hodsden v. Harridge, 2 Saund. 62, n. 4; Child v. Horden, 2 Bulst. 144; Gable v. Moss, 1 Bulst. 44; Juxon v. Thornhill, Cro. Car. 132. See Brooke v. Mitchell, 6 M. & W. 473.

(*a*) Naters v. Sutton, 11 Jur. 87; Owen v. Waters, 2 M. & W. 91; Shepherd v. Shepherd, 3 D. & L. 199; Granger v. Dacre, 12 M. & W. 431; Abbott v. Aslett, 1 M. & W. 209.

(*b*) Waters v. Bridge, Cro. Jac. 639.

(*c*) Rowe v. Young. 2 B. & B. 165, per Bailey, J., 233; Lambard v. Kingsford, Lutw. 558; Rodham v. Stroher, 3 Keb. 830.

If, however, the plaintiff be directed, on the receipt of the money at the time and place, to do a concurrent act, as for instance, if, on the money being paid him, he is to give the defendant a covenant of indemnity, the plaintiff cannot sue for the money without showing a readiness on his part to give the covenant; and therefore he must aver his own presence at the place, and attendance during the whole period appointed for payment of the money (*d*).

When plaintiff to perform a concurrent act.

If an action be brought on an award directing one of the parties to pay the expenses of the reference, and that the other should repay them on demand, it would seem that an averment of payment and of a request for repayment is necessary (*e*).

When costs to be repaid.

Where the defendant promised to pay the plaintiff £40 on request in case he did not perform an award, it was held that an actual request was necessary before action brought, and that the declaration should have averred a special request; and a distinction was taken between a promise to pay a collateral sum on request, as this £40 was, and a promise to pay a precedent debt or duty where no actual request is necessary (*f*).

Request to pay collateral sum.

In debt on an award by the assignee of an insolvent debtor, there is no necessity that the declaration should allege that the submission to arbitration was with consent in writing, of the major part of the creditors; for the reference is good without such consent, although the want of it may render the assignee responsible to the creditors (*g*).

Averment of creditor's consent to reference by assignee.

A party dying pending a reference, the arbitrator directed payment to be made by his executors out of his assets. In assumpsit against the executors, a statement in the declaration that they had had notice of the award, that by reason thereof they became liable as executors to pay according to the tenor of the award, and that being so liable, the execu-

Averment of promise by executors of deceased party.

(*d*) Rowe v. Young, 2 B. & B. 165, per Bailey, J. 234; Phillips v. Knightly, 1 Barnard. 84; S. C. Fitzg. 53.

(*e*) Driver v. Hood, 7 B. & C. 494; S. C. 1 M. & R. 324.

(*f*) Birks v. Trippet, 1 Saund. 32.

(*g*) Sutcliffe v. Brooke, 3 D. & L. 302. See P. 1, ch. 2, s. 3, d. 1, p. 40, reference by assignees of bankrupts and insolvents.

tors aforesaid [not saying as executors] promised to pay the amount according to the tenor of the award, was held to be a sufficient averment of a promise by them as executors to pay the amount out of the assets, and not a statement of a mere personal promise, for which there was no consideration stated. It was also decided, that it was not necessary to aver that the executors had any assets (*h*).

Indebitatus count on the award.

Before the new rules of pleading, H. T. 4 W. IV., which prohibit two counts for the same subject-matter, it was the practice in actions of debt or assumpsit on an award to add to the special count stating the submission and award in the manner previously recommended, a count alleging generally that the defendant was indebted to the plaintiff in a certain sum upon an award made by the arbitrator on a submission concerning the matters in difference between the plaintiff and defendant, by virtue of which the arbitrator had awarded the defendant to pay the sum claimed (*i*). The effect of such a count does not seem to have been much considered. On one occasion, Bayley, B., is reported to have said, "Is it quite clear that indebitatus assumpsit will lie on an award?" (*k*).

Debt on arbitration bond, award must be wholly set out.

II. *Averments in pleading stating an award in debt on an arbitration bond.*]—Where in debt on bond conditioned for the performance of an award, the plaintiff sets out the award in his declaration or replication, we have previously seen he must set out the whole or every part of it that is not void (*l*). Where, in such an action, the defendant pleaded no award, and the plaintiff in his replication set out part only of the award, and concluded with a profert, and the defendant craved oyer, and (the award being set forth at large)

(*h*) Dowse v. Coxe, 3 Bing. 30. See P. 2, ch. 3, s. 3, d. 8, p. 165, effect of clause preventing death from being a revocation.

(*i*) See the Forms, 2 Chitt. Pl. 61, 146, 6th Ed.

(*k*) Crump v. Adney, 1 C. & M. 355; S. C. 3. Tyrw. 279.

(*l*) See the previous division, p. 495. See the Appendix of Forms, for the pleadings in debt on the arbitration bond.

demurred generally, it was held that the action could not be maintained on account of the variance (*m*).

Plaintiff must assign breaches.

The plaintiff must assign breaches under the statute 8 & 9 W. III. c. 11, and cannot have judgment for the penalty and take out execution for the sum awarded, though there is only a single sum to be paid on the bond, namely, the amount of damages ascertained by the award; for a bond to perform an award is, in other words, a bond to perform an agreement, and comes directly within the words of the statute (*n*).

Replication to plea of no award must assign a breach.

In general, in an action of debt on bond for the performance of any act other than an award, if the defendant plead matter of excuse that admits a non-performance, the plaintiff need not assign a breach in his replication, but need only falsify the special matter alleged. But the case of an action on a bond to perform an award is an exception to this general rule (*o*). For there, if the defendant plead no award made, the replication, besides setting out the award, must also assign a breach; and the reason alleged for the difference is this, that though an award be made, it may be void in part, and that therefore the plaintiff must not only show the award that the court may see that there was an award, but must also set forth the breach, that it may appear likewise that the non-performance was of a good part of the award, and not of a void part thereof, for in the latter it need not be performed (*p*).

Breach assigned not traversable.

And yet the breach, when assigned, is not issuable or traversable, nor can the defendant give any answer to it, for the plea as between the parties has an issue before, and the breach is but an excrescence or surplusage (*q*); for any answer to the breach must necessarily admit the existence of

(*m*) Furlong v. Thornigold, 12 Mod. 533; S. C. Foreland v. Hornigold, 1 Lord Raym. 715; Foreland v. Marygold, 1 Salk. 72.

(*n*) Welch v. Ireland, 6 East, 613.

(*o*) Att. Gen. v. Elliston, 1 Stra. 191; Com. Dig. Pleader, F. 4.

(*p*) Meredith v. Alleyn, 1 Salk. 138; Hayman v. Gerrard, 1 Saund. 102; Com. Dig. Pleader, F. 14; Shelley v. Wright, Willes, 9; Barret v. Fletcher, Yelv. 152; Lee v. Elkins, 12 Mod. 585; Ormelade v. Coke, Cro. Jac. 354.

(*q*) Heard v. Baskerville, Hob. 232; Brickhead v. Archbishop of York, Hob. 197.

an award, and consequently would be a plain departure from the plea (*r*).

Demurrer for not assigning breach.

Still the want of assigning a breach is matter of substance, and bad on general demurrer (*s*). The same is the case if the plaintiff assign a bad breach, and it will not be aided after verdict (*t*).

What a good assignment of a breach.

If the award to pay a sum of money and costs be bad as to the costs, a replication in an action on the bond assigning as a breach the non-payment of the money only is good (*u*). So on an award that the defendant and a stranger shall do an act, assigning a breach in the neglect of the defendant only, is sufficient, when the direction as to the stranger is void (*x*).

When needless to assign breach in replication.

On a bond to perform an award, if the defendant plead in effect traversing the submission, or any other collateral matter, the plaintiff may join issue thereon without assigning a breach (*y*). So if the defendant show an award, and plead performance of part only, and issue be taken thereon (*z*).

If the defendant plead any plea admitting the award and excusing non-performance, as if he plead a release of all demands after the award, whereby he offers a special point in issue, it is sufficient for the plaintiff to answer the release, or other special matter alleged by the defendant, without assigning any breach (*a*).

Where an award is made that if the plaintiff pay the defendant ten pounds, then the defendant shall assure to the plaintiff a certain manor; if debt be brought on the arbitration bond, and the defendant plead that the plaintiff has not paid him the ten pounds, it is a good replication for the

(*r*) Morgan v. Man, T. Raym. 94; Gayle v. Betts, 1 Mod. 227; Bac. Ab. Arb. G.

(*s*) Barret v. Fletcher, Cro. Jac. 220; S. C. Yelv. 152; Heard v. Baskerville, Hob. 232; Brickhead v. Archbishop of York, Hob. 197.

(*t*) Com. Dig. Pleader, F. 14; Pit v. Wardal, Godb. 164.

(*u*) Addison v. Gray, 2 Wils. 293; Fox v. Smith, 2 Wils. 267.

(*x*) Oldfield v. Wilmer, 1 Leon, 140, 304; S. C. Owen, 153; Pit v. Wardal, Godb. 164; Bac. Ab. Arb. G.

(*y*) Com. Dig. Plead. F. 15; Bac. Ab. Arb. G.; Kind v. Carter, 1 Sid. 290; Strike v. Benstey, 1 Lutw. 525.

(*z*) Genne v. Tinker, 3 Lev. 24; Com. Dig. Plead. F. 15.

(*a*) Jeffrey v. Guy, Yelv. 78.

plaintiff to say that he has paid the ten pounds, without saying further that the defendant has not assured him the manor; for when the plaintiff has given a direct answer to the special matter alleged in bar he need not make any other addition (*b*).

When replication to conclude with a verification.

When the defendant pleads no award, and the plaintiff replies setting out an award, it seems clear, from the case of *Fisher* v. *Pimbley* (*c*), that such replication should conclude with a verification, in order that the defendant may have an opportunity of pleading in his rejoinder matter which may show the award to be void in law (*d*).

If in debt on bond conditioned to perform an award the defendant in his plea set out part only of the award, and aver performance; and the award as set out be bad, and the plaintiff in his replication set out the rest of the award, it is a question whether he ought to conclude it with a verification, or to the country. In the learned note to the case cited below, the opinion is expressed, that the proper conclusion should be to the country, on the ground that as the use of concluding with an averment is to give the opposite party an opportunity of traversing the new matter alleged, that did not apply here, as the defendant having, by pleading performance, admitted the validity of the award, could not, without being guilty of a departure, traverse the statements in the replication which show the award to be good (*e*). Yet the award might not be correctly stated.

To debt on bond conditioned to perform an award, the defendant pleaded an award and a tender pursuant to it; the plaintiff replied, setting forth matter showing the award good, and traversing the tender, concluding to the country; the court was divided as to the validity of the replication; one part holding it ought to have concluded with a verification, and so permitted the defendant to traverse the allega-

(*b*) Baily v. Taylor, Yelv. 24.
(*c*) 11 East, 188.
(*d*) Veale v. Warner, 1 Saund. 326, b. n. 1, h.
(*e*) Veale v. Warner, 1 Saund. 326, b. n. 1.

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tions in it; the other saying that the defendant by pleading performance had barred himself from traversing matter which went to support the validity of the award (*f*).

SECTION III.

THE EFFECT OF AN AWARD AS A PLEA.

When award must be pleaded.

Though before the new rules of pleading an award might generally have been given in evidence under the general issue in an action on the original demand, it was frequently advisable to plead it in order to compel the plaintiff in his replication to take issue on some particular part of the plea, and thereby admit the residue, or to reply specially. Now, however, since the Reg. Gen. H. T. 4 W. IV., an award must be pleaded specially as a defence, when it operates as a discharge of the right to sue (*a*).

When plea of award without averment of performance good.

In very old times, during which it was considered that when the submission was not under seal no action could be maintained on an award directing the doing anything but the payment of money, it was laid down that as the plaintiff had no means of compelling performance, such an award was no bar to an action for the original matters in dispute, until the defendant had performed what the award directed (*b*).

When new duty created in satisfaction of old claim.

But since it has been decided that assumpsit lies on the award under such a submission, it has been held that whenever the award gives a new duty in lieu of the former, or awards any collateral matter in satisfaction of the debt or

(*f*) Seal v. Crowe, 3 Lev. 164.

(*a*) 2 Chitt. Pl. 146, notes, 6th Ed.; Allen v. Milner, 2 C. & J. 47; 3 Chitt. Pl. 793, notes, 6th Ed.

(*b*) Rolle, Ab. Arb. X. 1, p. 266.

grievance, it may be pleaded in bar without any averment of performance (*c*).

In the following case a somewhat peculiar distinction was taken. In answer to an action of assumpsit for not delivering some hops pursuant to a contract, it was held that an award of mutual releases alone on a reference of all matters in difference could not be pleaded in bar without averring that the defendant had executed a release. A statement that he was always ready to execute was not considered sufficient, for the release, it was said, created no new duty in satisfaction of the claim (*d*).

Old rule, claim extinguished sub modo.

According to the old cases the award only extinguishes the original claim sub modo; for it is said that if the time of performance be past before the action is brought, the award cannot be pleaded in bar without showing performance, though the plaintiff has a remedy by action on the award; as for instance, if the award be to pay money or to execute a bond at a day past, the defendant ought to show that he has paid the money or given the bond, unless, indeed, the plaintiff is the cause of the award not being performed, as if the defendant tender the money at the day and the plaintiff refuse it (*e*).

But it is apprehended that the courts would now hold, that the award either does not extinguish the original claim, or extinguishes it altogether. The modern doctrine seems to be this:—

Modern rule as to pleading performance.

If an action be brought for a debt, whether the form be debt or assumpsit, an award respecting the claim, ascertaining the amount of the debt, and directing payment, cannot be pleaded in bar to the action without alleging performance; for the money until paid is due in respect of the

(*c*) Gascoyne v. Edwards, 1 Y. & J. 19; Crofts v. Harris Carth. 187; Freeman v. Bernard, 1 Salk. 69; S. C. 1 Lord Raym. 247; Purslow v. Bailey, 1 Salk. 76; S. C. 6 Mod. 221; 2 Lord Raym. 1039; Allen v. Harris, 1 Lord Raym. 122; Bac. Ab. Arb. G.

(*d*) Freeman v. Bernard, 1 Salk. 69; S. C. 1 Ld. Raym. 247; Clapcott v. Davy, 1 Lord Raym. 611.

(*e*) Com. Dig. Accord. D. 2, 3; Rolle, Ab. Arb. Z. 267; Bac. Ab. Arb. G.; Dighton v. Whiting, 1 Lutw. 51; Linch v. Dacy, 1 Keb. 848; Hare v. George, Cro. Eliz. 66; Clapcott v. Davy, 1 Lord Raym. 611.

original debt: as for instance, if the claim be for tolls the sum awarded is due for tolls still. But if the claim be of a different nature, as for example, to have goods delivered, and the award direct payment of money in satisfaction of the demand, the right to have the goods seems to be gone, and the only right remaining is the substituted right to have the money awarded. So if the demand be for a debt, and the award direct not payment in money, but payment in a collateral way, as by delivery of goods or performance of work, it seems the right to have payment in money is extinguished. In like manner, if the claim be for unliquidated damages, an award of a sum certain in satisfaction is, it is apprehended, a good bar without alleging performance (*f*).

Award a bar where accord and satisfaction a bar.

In all actions where accord and satisfaction is a good defence, an award may be pleaded in bar (*g*).

When an award may be pleaded by a stranger.

To an action of trespass a defendant may sometimes plead an award made on a submission between the plaintiff and a stranger. An award between A. and B. for a trespass done by C.'s cattle, when in the possession of A., is a good bar to an action by B. against C. for the same trespass (*h*). So to an action of trespass the defendant may plead that the trespass was committed by himself and another, and that the matter was afterwards submitted to arbitration by the plaintiff, the defendant, and the other trespasser, and determined by an award (*i*).

Payment according to void award.

If a man pay money on a void award, and it be accepted, it may be pleaded as an accord and satisfaction (*k*).

Award as to part of demand.

An award which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand (*l*).

Plea of award on parol sub-

To an action on a bond for money, a plea that after the money became due the plaintiff and the defendant, by parol,

(*f*) Allen v. Milner, 2 C. & J. 47.

(*g*) Com. Dig. Accord. D. 1; Blake's Case, 6 Rep. 43, b.; Bac. Ab. Arb. G.

(*h*) Com. Dig. Accord, D. 1; Rolle, Ab. Arb. B. 1, p. 268.

(*i*) Thomlinson v. Arriskin, 1 Com. Rep. 328; Bac. Ab. Arb. G.

(*k*) Bacon v. Dubarry, 1 Salk. 70.

(*l*) Clapcott v. Davy, 1 Lord Raym. 611; Farrer v. Bates, Al. 4; Bac. Ab. Arb. G.

submitted to an award; that the arbitrator awarded the defendant to pay the plaintiff a certain sum, and that he tendered the sum, was held bad on demurrer, the debt being due by specialty (*m*).

Submission no discharge of bond.

If a cause be referred after issue joined, and the plaintiff nevertheless proceed with the action, and after an award in the defendant's favor take it down to trial, the award may be pleaded as a plea to the further maintenance of the action; formerly it was by way of plea puis darreign continuance. It is apprehended, to have the benefit of the award, the defendant must so plead it, for it seems to have been inadmissible in evidence even before the new rules of pleading (*n*).

Pleading award to further maintenance of the action.

A replication in replevin justifying a distress under a power to distrain given by an award, is a departure from an avowry relying on the common law right to distrain for rent service (*o*).

Replying power to distrain by award departure from avowry of common law power.

SECTION IV.

HOW TO ANSWER IN PLEADING AN AWARD PLEADED.

1. *Traversing the submission.*]—It is not intended in this section to enumerate all the kinds of defences which may be pleaded to defeat a claim resting on an award. Those only are discussed which have some special reference to the subject of arbitration.

Defeating award pleaded.

Though the following observations treat principally of the

(*m*) Luddington v. White, Sty. 350.

(*n*) Lowes v. Kermode, 8 Taunt. 146; Storey v. Bloxham, 2 Esp. 503.

(*o*) Pascoe v. Pascoe, 3 Bing. N. C. 898.

pleas which may be employed in answer to actions to enforce an award, the principles involved in the positions laid down seem, in most cases, equally applicable to replications when an award is pleaded as a defence.

Traversing the submission.

If a defendant in an action to enforce an award deny that he entered into any submission, or into the submission set out in the declaration, he must traverse the fact.

In debt on bond and covenant.

In debt on the arbitration bond, or in covenant for not performing the award, the plea of non est factum is the proper traverse.

In assumpsit.

In assumpsit the general issue non assumpsit puts in issue the validity of the submission.

In debt on the award.

In debt on the award, when the submission is not under seal, it does not seem clear whether the plaintiff ought specifically to traverse the submission, for the plea of nunquam indebitatus is admissible only in debt on simple contract, and it does not seem to be decided whether a debt arising from the legal liability of an award be a debt on simple contract within the meaning of the rule (*a*). Supposing it admissible, the effect, it is presumed, would be to put the submission in issue.

Plea of no award means no valid award.

II. *Pleading no award made.*]—If, as far as appears in the pleadings, the award be good, and the defendant intend to dispute its validity either for defects apparent on its face, though not shown on the record, or on the ground that the arbitrator has failed to decide on a matter in difference brought before him, and that therefore the award is not final, the proper plea is, that the arbitrator did not make an award in manner and form as alleged. Under this plea the defendant will be entitled to object to the validity of the award when produced in evidence, and also be permitted to prove that a matter presented to the arbitrator for determination has not been decided. For the plea of no award means no

(*a*) Reg. Gen. H. T. 4 W. IV.; Hodsden v. Harridge, 2 Saund. 61, m." See Riddell v. Sutton, 2 M. & P. 345.

valid award according to the submission, whether there was an award in fact or not (*b*).

Formerly meant no award in fact.

Anciently, the plea of no award meant strictly that no award at all had been made. Hence, according to the old cases, if to debt on bond for non-performance of the award the defendant pleaded no award made, and the plaintiff replied by setting out an award, and assigned a breach, the defendant was considered guilty of a departure if he rejoined matter showing that though there was an award in fact it was void in law; as for instance, where the rejoinder showed that on one matter in difference brought before the arbitrators they had failed to make any award, or that the award was not delivered pursuant to the submission; and it was stated that the proper course for the defendant to pursue was, instead of pleading no award, to plead the award, and then aver in the plea the other matter which made it void (*c*); for that after pleading no award made, the only allowable rejoinder to a replication setting out an award was,—that the arbitrator made no such award (*d*).

In the following case the principle, that a plea of no award meant no award in fact according to the ancient cases, was distinctly overruled.

Plea no award rejoinder award void in law, no departure.

To debt on bond the defendant, after craving oyer of the bond and condition, by which it appeared that the bond was conditioned to abide an award on all causes of action, controversies, and demands between the plaintiff and defendant, pleaded no award made. The plaintiff replied, that the arbitrators duly made their award, by which they awarded that the defendant should pay the plaintiff a certain sum "for all the coal gotten by him as thereinbefore mentioned." The defendant rejoined, and set out the whole award verba-

(*b*) Dresser v. Stansfield, 14 M. & W. 822; Fisher v. Pimbley, 11 East, 188; Gisborne v. Hart, 5 M. & W. 50; Hickes v. Cracknell, 3 M. & W. 72; Spooner v. Payne, 16 L. J., C. P. 225.

(*c*) House v. Launder, 1 Lev. 85; Harding v. Holmes, 1 Wils. 122; Morgan v. Man, 1 Lev. 127; S. C. T. Raym. 94; Roberts v. Marriot, 2 Saund. 183; S. C. 1 Lev. 300; Com. Dig. Pleader, F. 7; Keilway, 175.

(*d*) Skinner v. Andrews, 1 Lev. 245.

tim, by which it appeared that the subjects of reference were disputes between the plaintiff and defendant, and that the damages awarded to the plaintiff were in respect of coal belonging to the plaintiff, *or to the plaintiff and others with him*. The court on demurrer held the rejoinder to be no departure from the plea, as the plea meant no legal and valid award according to the submission, and the rejoinder showing the award invalid merely maintained the plea; and Bailey, J., was of opinion that the defendant could not have defended himself by taking issue on the replication, for there was such an award as there stated, though there was not an award conformable to the submission, since it gave compensation for matters beyond the submission, namely, for coal in which the plaintiff, *or the plaintiff with others, was interested*, and was therefore bad. The court held, also, that if the award had been truly set out in the replication, the defendant ought to have demurred to it; and as the replication only set it out partially, the defendant was at liberty to set it out truly in his rejoinder, and on demurrer object to its validity (*e*).

Rejoining performance a departure.

After a plea of no award, and a replication setting out an award to pay money, and alleging non-payment, the defendant cannot rejoin payment without being guilty of a departure (*f*).

Averment no award by arbitrators or umpire.

If in debt on the arbitration bond it appear on oyer that the condition is to abide by the award of arbitrators, and in case they make no award within a certain time, of an umpire, the plea denying the award should allege that neither the arbitrators nor the umpire made an award (*g*).

Plea of facts showing award void, argumentative plea of no award.

Where a defendant desired to impeach the award, until the recent case of *Dresser* v. *Stansfield* (*h*), it seems to have been considered not only that he might, but that he should, state in a special plea the facts which showed that the award was not final, and conclude it with a verification (*i*). But

(*e*) Fisher v. Pimbley, 11 East, 188.
(*f*) Hinton v. Cray, 3 Keb. 512.
(*g*) Hinton v. Cray, 3 Keb. 512.
(*h*) 14 M. & W. 822.
(*i*) Gisborne v. Hart, 5 M. & W. 50; Perry v. Mitchell, 2 D. & L. 452.

in the case above referred to (*k*), a special plea setting forth that some issues were joined in the cause referred, and showing that the award had not decided them, and was therefore not final, was held bad on special demurrer as amounting to an argumentative plea of no award. To make such a plea good on special demurrer, it should at all events conclude with a special traverse,—"and so that there was no award of and concerning the premises" (*l*).

Should conclude with a special traverse.

If the objection to the award be that the arbitrator has not decided all the questions, in order to render the plea good at all it must aver notice to the arbitrators of the matters omitted from decision (*m*).

Averring notice to arbitrators of matters omitted.

In an action of debt on the arbitration bond the defendant pleaded the condition of the bond, set forth the award in its terms, and then averred that a question as to the defendant's right to an indemnity from the plaintiff against certain liabilities was a matter in difference, and brought before the notice of the arbitrators, and that they had not in their award given any directions touching the same. On demurrer, the plea was held good, and judgment was given for the defendant (*n*).

Pleading award with averments showing it void.

The above case was quoted in argument in support of the special plea in *Dresser* v. *Stansfield*, but the court drew a distinction between it and the question before them; Alderson, B., saying, "There was a primâ facie case by the bond, which the defendant had to answer by showing an award which was invalid." And Parke, B., added, "The objection there came from the party who stated the award. That case is certainly no authority for you" (*o*).

III. *Misconduct or mistake of arbitrator not pleadable.*]— To an action of debt on bond for not performing an award,

Misconduct of arbitrator not pleadable.

(*k*) Dresser v. Stansfield, 14 M. & W. 822.

(*l*) Dresser v. Stansfield, 14 M. & W. 822. See Linsey v. Ashton, Godb. 255.

(*m*) Elsom v. Rolfe, 2 Smith 459.

(*n*) Mitchell v. Staveley, 16 East, 58.

(*o*) Dresser v. Stansfield, 14 M. & W. 822.

or to an action on the award itself, the defendant cannot plead collusion or other misconduct of the arbitrator in avoidance of the award (*p*).

In the case of *Veale* v. *Warner* (*q*), the very learned reporter, Saunders, mentioning that he was reprehended for pleading so subtlely as to trick the plaintiff, excuses his conduct by alleging that it was a case of very great hardship on the defendant, and that afterwards the defendant had relief in the Exchequer against the arbitration bond on the ground of bad practice of the plaintiff with the arbitrator. Mr. Serjeant Williams, treating of a plea of collusion of the arbitrator, in his note on the above case, says, "As such a plea would in the principal case have been supported by the facts, it may be pronounced almost with absolute certainty that so able a lawyer as the reporter is known to have been would have stated the facts as a defence to the action, and not have had recourse to the unworthy trick for which he was so justly censured, if the plea could have been supported in point of law." And he adds, "There seems to be no case or dictum where a plea of this sort has been held to be pleadable, nor is a precedent of such a plea to be found in any of the books of entries" (*r*).

A plea that the arbitrator refused the defendant reasonable time to bring forward his witnesses, though he had several material witnesses to examine, was held bad on demurrer, as imputing misconduct (*s*). So, also, that he made his award without hearing the defendant or his witnesses (*t*). In this latter case Lord Ellenborough, C. J., said, "How can the injustice of the arbitrator be pleaded against one of the parties without at least implicating him in it?" If the observations of Mr. Serjeant Williams on the case of *Veale* v. *Warner* (*u*), previously cited, are good law, the collusion of a party would not render the matter more pleadable, for

Arbitrator colluding with party.

(*p*) Wills v. Maccarmick, 2 Wils. 148; Brazier v. Bryant, 10 Moore, 587; Chicot v. Lequesne, 2 Ves. Sr. 315.

(*q*) 1 Saund. 327, a. n. 3.

(*r*) Veale v. Warner, 1 Saund. 327, a. n. 3.

(*s*) Grazebrook v. Davis, 5 B. & C. 534.

(*t*) Braddick v. Thomson, 8 East, 344.

(*u*) 1 Saund. 327, a. n. 3.

it is distinctly stated in that case that the defendant obtained relief against the bond in the Exchequer on the ground of the plaintiff's bad practice with the arbitrator (*x*).

Where the award directed an executrix to pay a sum of money, a plea by her that there was no admission or evidence of assets before the arbitrator, was held ill on general demurrer, as imputing misconduct to the arbitrator; for directing a personal representative who had no assets to pay the debts of the deceased would be unjust (*y*).

Pleading separate execution of award by joint arbitrators.

The Court of Exchequer, in a recent case, expressed an opinion that to an action on the award the defendant might plead that the joint arbitrators executed the award separately and not in each other's presence, and so raise on the record the question of the validity of such a mode of execution (*z*).

Mistake of arbitrator cannot be pleaded.

The mistake of an arbitrator cannot be pleaded in bar, any more than his wilful misconduct (*a*).

IV. *Pleading performance of the award.*]—In debt on bond for non-performance of an award, the defendant cannot plead generally that he has performed it, but he must show the award and how he has performed it (*b*).

Plea must show how award performed.

Must aver entire performance.

The plea should state a performance of every part of the award for which the defendant is liable, or it will be bad in law. Where in debt on bond conditioned that the defendant and two others should perform an award, the defendant pleaded an award that he and each of the others should pay 20*s.* each to the plaintiff, and that he had paid the 20*s.*, but said nothing as to the sums to be paid by the other two, which he ought to have done, inasmuch as he was answerable for the whole money, the plea was decided to be insufficient (*c*).

(*x*) Dyer v. Dawson, cited in Heming v. Swinnerton, 1 Coop. C. C. 420, notes.

(*y*) Riddell v. Sutton, 5 Bing. 200; S. C. 2 M. & P. 345.

(*z*) Stalworth v. Inns, 13 M. & W. 466.

(*a*) Hall & Hinds, In re, 2 M. & G. 847. See note, 852; Johnson v. Durant, 2 B. & Ad. 925.

(*b*) Anon. F. Moore, 3, pl. 9.

(*c*) Genne v. Tinker, 3 Lev. 24; Veale v. Warner, 1 Saund. 324, a. 1, 3.

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Tender of rent awarded to be paid must be pleaded to have been made on the land, and at the last hour of the appointed day (*d*).

Plea of tender of rent awarded.

Setting out document referred to in award.

When an award directs a party to pay the rent mentioned in a certain indenture, in pleading performance he need not set forth the indenture, but it will be sufficient to refer to it generally. But if he be ordered by the award to pay it in such manner and at such times as is expressed in the indenture, then he must set the indenture out at length. A similar rule is applicable to an award directing payment of money bequeathed by a will (*e*).

Plea of Statute of Limitations.

v. *Other pleadings to defeat the award.*]—In debt on an award under the hand and seal of the arbitrator, a plea that the cause of action did not accrue within six years was formerly held bad, since the Statute of Limitations, 1 James I. c. 16, s. 3, did not apply to awards under hand and seal, which were said to be quasi specialties, or, it is presumed, to any awards at all (*f*). Now, however, the plea would be good, since by the statute 3 & 4 W. IV. c. 42, s. 3, "all actions of debt upon any award, where the submission is not by specialty," shall be commenced and sued within three years after the end of the session in which the Act passed, or within six years after the cause of such action, but not after.

Plea of revocation by will of party.

A plea that the defendant revoked the authority of the arbitrator before the award was made, is a good answer to any claim on the award, when the submission is one that cannot be made a rule of court, and so not within the operation of the stat. 3 & 4 W. III. c. 42, s. 39, which prohibits revocation in such cases (*g*).

By marriage of female party.

The marriage of a female party to the submission pending

(*d*) Furser v. Prowd, Cro. Jac. 423.

(*e*) Anon. 1 Vent. 87; Hagh v. Chadwick, 2 Keb. 667.

(*f*) Hodsden v. Harridge, 2 Saund. 61, m.; S. C. 2 Keb. 462.

(*g*) Marsh v. Bulteel, 5 B. & A. 507.

the reference may be pleaded as a revocation of the arbitrator's authority (*g*).

By bankruptcy or insolvency.

But the bankruptcy or insolvency of a party before the award is executed cannot be pleaded as a revocation (*h*), though bankruptcy and insolvency may sometimes bar the claim on the award (*i*).

Plea of foreign attachment.

In debt on bond, where the award was to pay money by a particular day, a plea that a foreign attachment in London issued the same day the money was payable, and that by virtue of it the money awarded was attached in the defendant's hands the day after, was held bad, because the penalty was due when the money was not paid by the day. But Holt, C. J., said the plea would have been a good plea to an action of debt on the award, but not to an action of debt on the bond (*k*).

Of waiver of the award.

An agreement not under seal to waive and abandon the award cannot be pleaded in answer to an action on the arbitration bond. The only remedy is by cross action against the plaintiff for suing on the bond in breach of the agreement (*l*).

Award not ready to be delivered.

A plea that the award was not made ready to be delivered within the time limited is said to be a good plea, though probably, in most cases, it would now be considered open to special demurrer as an argumentative plea of no award (*m*).

Not made within reasonable time.

Where the submission contains no limit as to time, a plea to an action on the award, that the arbitrators did not make their award within a reasonable time, is bad (*n*).

Replication claim not covered by award pleaded.

To a plea of an award, the plaintiff replied that the subject matter of his action was not included in the reference; though the submission was of all matters in difference,

(*g*) Charnley v. Winstanley, 5 East, 266.

(*h*) See P. 2, ch. 3, s. 3, d. 4, p. 157.

(*i*) See P. 3, ch. 1, d. 7. p. 465.

(*k*) Ingram v. Bernard, 1 Lord Raym. 636. See Robbins v. Standard, Sid. 327. See Coppell v. Smith, 4 T. R. 312.

(*l*) Braddick v. Thompson, 8 East, 344.

(*m*) See P. 3, ch. 3, s. 2, d. 1. p. 493.

(*n*) Curtis v. Potts, 3 M. & S. 145.

and the cause of action existed at the time of the submission, the plaintiff was allowed to show it was not referred (*o*).

Demurrer to pleading stating bad award.

If the plaintiff set out an award bad on its face as stated in the pleadings, the defendant should demur (*p*).

SECTION V.

EFFECT OF AN AWARD IN EVIDENCE.

Execution of submission by all parties must be proved.

I. *Proof of the submission and award.*]—In debt on an award the submission of all the parties, if traversed, must be proved. If the submission be by agreement in writing, bond, or deed, evidence must be given by the plaintiff of the execution of the instrument by himself and by every party to it, though they are not parties to the action (*a*). The like necessity is imposed on a defendant who relies on an award as a defence. As in the case of contracts for other purposes, the execution must be proved by the attesting witness, if there be one, unless his absence be sufficiently accounted for (*b*).

Rule of court no evidence of submission by agreement.

A submission, in writing, and attested, is not sufficiently proved by evidence of a rule making the agreement a rule of court under the stat. 9 & 10 W. III. c. 15; for the character of the instrument is not changed by being made a rule of court for the particular purpose of summary enforcement. As it is a contract deriving its force from the consent of the

(*o*) Ravee v. Farmer, 4 T. R. 146.

(*p*) Gisborne v. Hart, 5 M. & W. 50; Cargey v. Aitcheson, 2 B. & C. 170; Fisher v, Pimbley, 11 East, 188.

(*a*) Ferrer v. Oven, 7 B. & C. 427; Antram v. Chace, 15 East, 208; Brazier v. Jones, 8 B. & C. 124; Kingston v. Phelps, 1 Peake, N. P. 299.

(*b*) Spooner v. Payne, 4 C. B. 328; S. C. 16 L. J., C. P. 225.

parties, and not from the rule, it ought to be proved like any other contract (*c*).

But evidence of submission by judge's order.

But a submission by a judge's order is properly evidenced by the rule of court; for the judge's order is itself a judicial act, and when made a rule is not altered in character only in form, and the submission becomes a submission by rule of court just as much as if it had originally been so without a judge's order (*d*).

Performance evidence of submission.

An award ordered the defendant to sign a memorandum by which he undertook not to pirate the plaintiff's inventions; proof that he had signed a memorandum in terms according with the directions of the award, was held sufficient evidence of his having submitted to the arbitration (*e*).

Evidence of appointment of umpire.

The recital in the award that the two arbitrators had appointed a third to act with them pursuant to the submission, was held no evidence of the appointment of the third. Nor could proof of the fact of his having acted with the other arbitrators in the course of the arbitration, and of his having signed the award, supply the proof of a formal appointment; since the mere suffering the third person to sit along with them and to sign the award would not be sufficient to vest in him any authority (*f*).

Primâ facie evidence of valid award.

On a submission by rule of court the production of the rule of court and award (with proof of the execution of the latter) is primâ facie evidence in assumpsit on the award on the part of the plaintiff, and sustains the declaration, unless the validity of the award be impeached by evidence dehors on the part of the defendant (*g*).

An award purporting to be made by three but signed by two only of the arbitrators, was held to support an averment alleging it made by the two (*h*).

When notices under Inclosure Act pre-

On an indictment for non-repair of a road, an award under an Inclosure Act, which empowered the commissioners, on giving certain notices to the parties to be affected, to adjudge

(*c*) Berney v. Read, 7 Q. B. 79.
(*d*) Berney v. Read, 7 Q. B. 79; Still v. Halford, 4 Camp. 17.
(*e*) Stuart v. Nicholson, 3 Bing. N. C. 113.
(*f*) Still v. Halford, 4 Camp. 17.
(*g*) Gisborne v. Hart, 5 M. & W. 50.
(*h*) White v. Sharp, 12 M. & W. 712.

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sumed given.

to which parish particular roads should belong, was tendered in evidence by the defendant parish to show that the road had been awarded to be in another parish; but as there was evidence of repair and other admissions by the defendants subsequent to the award, the court refused to receive the award without proof of the notices, since the usage contrary to the award rebutted the primâ facie presumption that all the proper steps had been taken (*i*).

Award conclusive as evidence.

II. *Valid award conclusive as evidence.*]—The effect of an award in evidence, as between the parties, is most conclusive, and while unimpeached precludes other evidence being given to contradict it (*k*).

When evidence of original claim.

Before the new rules, an award might generally have been given in evidence under the general issue non assumpsit; and it seems it may so still, on a count founded on the original debt, when the award only settles the amount of the claim, but does not change its nature (*l*).

Evidence under account stated.

As arbitrators are not agents to state an account, but judges to decide disputes, an award is not evidence as an account stated (*m*); though where there were no arbitration bonds, Lord Ellenborough, C. J., once admitted it as such (*n*). An award ascertaining the value of some furniture, &c., adopted and acted on by the defendant, was held evidence of an account stated (*o*).

Award conclusive on title to land.

In ejectment, a previous award between the same parties, respecting the title to the land, is conclusive evidence of the right (*p*).

On amount of damages.

In covenant for non-repair, a verbal award determining

(*i*) R. v. Haslingfield, 2 M. & S. 558.

(*k*) Sybray v. White, 1 M. & W. 435; Whitehead v. Tattersall, 1 A. & E. 491; Bailey v. Lechmere, 1 Esp. 375.

(*l*) Allen v. Milner, 2 C. & J. 47; 2 Chitt. Pl. 146, notes, 6th Ed.; Kingston v. Phelps, 1 Peake, N. P. 299.

(*m*) Bates v. Townley, 12 Jur. 606.

(*n*) Keen v. Batshore, 1 Esp. 194.

(*o*) Salmon v. Watson, 4 Moore, 73.

(*p*) Doe d. Madkins, v. Horner. 8 A. & E. 235; Doe d. Greville v. Roper, Woodfall's Land. & Ten. 788, 5th Ed.; Doe d. Morris v. Rosser, 3 East, 15. See Richards v. Bassett, 10 B. & C. 657.

the amount of damages prevents the plaintiff proving any different amount (*q*).

When against executor, as to assets.

In an action of assumpsit against an executor who pleads "plene administravit" alone, an award on a submission between the plaintiff and the defendant as executor, respecting the matters in difference between the plaintiff and the testator, which ascertains the amount due from the testator's estate to the plaintiff, but does not direct the defendant to pay it, cannot be offered by the plaintiff in evidence as an admission of assets by the defendant to defeat the plea (*r*). But if the arbitrator order the executor to pay the amount, the award will, it seems, be conclusive evidence of assets in his hands, which he will not be permitted to contradict (*s*).

Award in action not evidence on indictment of party.

An indictment having been brought against a plaintiff for perjury, alleged to have been committed by him in deposing, in an affidavit, that the defendant in the action, the prosecutor of the indictment, was indebted to him in a certain sum; the award of an arbitrator, to whom the action for the supposed debt had been referred, directing a verdict for the defendant, was held not to be admissible in evidence for the crown on the trial of the indictment; on the ground that the decision of the arbitrator in respect of the action was no more than a declaration of his opinion, and that there was no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it, in any criminal case (*t*).

Award no evidence against strangers.

III. *Effect of an award as evidence as to strangers.*]—It is laid down as a universal rule, that it is only as regards the parties to the submission, or those claiming under them, that an award has any force at all. No instance, it is said, can be proved in which strangers have been held to be in any way affected in their rights by an award, as evidence either of right or of reputation (*u*).

(*q*) Whitehead v. Tattersall, 1 A. & E. 491.

(*r*) Pearson v. Henry, 5 T. R. 6.

(*s*) Worthington v. Barlow, 7 T. R. 453.

(*t*) R. v. Fontainemoreau, 17 L. J., Q. B. 187; S. C. 12 Jur. 626. See 2 Pitt Taylor on Evidence, 1114.

(*u*) Evans v. Rees, 10 A. & E. 151.

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Not evidence of right against strangers.

Hence, in an ejectment on the several demises of a mortgagor and mortgagee, (the lessor of the plaintiff at the trial relying on the title of the mortgagee,) the defendant was not allowed to give in evidence an award in his favor respecting the same land, made on a submission between himself and the mortgagor subsequent to the mortgage; although under that award the defendant had obtained and kept possession of the land, and the mortgagee had been present at one meeting in the reference, not however taking any part in it (*x*).

Award in a cause not evidence for the crown against party.

We have just seen that the award in a cause, deciding that the plaintiff has no claim, cannot be given in evidence by the crown against the plaintiff, on an indictment of the latter for perjury, for alleging in an affidavit that the defendant was indebted to him, although the defendant be the prosecutor of the indictment (*y*).

Award not evidence of reputation against stranger.

Upon an indictment for non-repair of a highway, which it was alleged the defendant was bound to repair ratione tenuræ, an award on the question of liability, made under a submission by a former tenant for years of the land, was held not receivable in evidence as an adjudication on the point, since an award only binds the parties to the submission. Neither was it considered admissible as evidence of reputation, for evidence of the statements of witnesses before the arbitrator, even if they were deceased, would not have been admissible as having been made "post litem motam," and the arbitrator's opinion, formed on those statements, and expressed in his award, could not be entitled to more credit (*z*). The latter objection, indeed, applies equally to the verdict of a jury; so the courts, remarking that the rule of a verdict being evidence of reputation stands more upon authority than principle, refuse to extend it further; and though for many purposes an award is equivalent to a verdict, yet they will not consider it so for this; nor on

(*x*) Doe d. Smith v. Webber, 1 A. & E. 119.

(*y*) R. v. Fontainemoreau, 17 L. J., Q. B. 187. See above, p. 517.

(*z*) R. v. Cotton, 3 Camp. 444.

an issue respecting the boundary between two parishes in adjoining counties, will they admit as evidence of reputation an award inter alios professing to set out the boundary (*z*).

Order of justices to support award presumed.

Where an inclosure act authorized the commissioners to stop up some roads, and there was a proviso that no such roads should be stopped up without the concurrence and order of two justices; the court held that the award, which, professing to be in pursuance of the powers of the act, "and by the concurrence and order of," &c. "two of his majesty's justices of the peace," stopped up a public footpath, was sufficient primâ facie evidence that the road had been duly stopped up by the concurrence and order of two justices; (though no order of justices was produced, and none could be found in the place of deposit mentioned in the act for the award and documents relating thereto:) the subsequent enjoyment not being shown to be inconsistent with the award (*a*).

Award evidence for stranger.

In some particular instances an award may be available in evidence for a person who is not a party to the submission.

In an action for false imprisonment against a servant of the East India Company, the defendant was allowed to give in evidence, in mitigation of damages under the general issue, a release given by the plaintiff to the East India Company, in pursuance of an award between the plaintiff and the company, in which the plaintiff was awarded a large compensation for injuries done him by the company's servants, particularly by the defendant; the matters in difference in terms comprehending the claim in the action (*b*).

Award evidence for arbitrator.

An award respecting the right to a chattel deposited with the arbitrator precludes the party against whom the award is made from maintaining trover against the arbitrator for refusing to deliver up the chattel to him, since the award

(*z*) Evans v. Rees, 10 A. & E. 151.

(*a*) Manning v. Eastern Counties Railway Comp. 12 M. & W. 237.

(*b*) Shelling v. Farmer, 1 Stra. 646.

deciding against him is evidence that the withholding the chattel is no unlawful conversion (*c*).

Award acted on evidence affecting strangers.

An award acted on may sometimes be admissible as evidence between strangers.

Award respecting right to tolls.

In a case at Nisi Prius before Lord Tenterden, C. J., an award of the time of Henry VIII. between the Corporation and University of Cambridge, regulating the amount of toll payable to the Corporation, was held inadmissible as evidence of reputation respecting the right to tolls in an action between the lessee of the Corporation and a third party, there being no proof that it had been acted on; yet a deed respecting the same question and founded on the award was admitted. In the same case, another award of the same reign, by which certain parties were discharged of toll to the Corporation of Cambridge in consideration of a specified annual payment was admitted in evidence, the plaintiff undertaking to prove payment of the composition, but on his failing to do so the evidence of the latter award also was struck out (*d*).

Stranger acquiescing in award.

Where a tenant under a sixty years' lease, having been served with a notice of an award made between two parties who had claimed rights (paramount to that of his lease) to enter and possess the lands to recover rent charges in arrear, attorned and paid rent to the one to whose claim the award gave priority; it was held on proof of these facts that he became tenant to the latter from year to year (*e*).

On an issue respecting the title to some growing crops seized by a creditor of the tenant of the land, an award between the landlord and tenant directing the tenancy to cease, and the tenant to deliver up possession, was held admissible in evidence, though of itself it could not transfer the property in the crops to the landlord (*f*).

Award acted on an estoppel.

The right to a farm being in dispute, the parties agreed to be bound by the decision of an arbitrator, and he awarded

(*c*) Gunton v. Nurse, 5 Moore, 259.

(*d*) Brett v. Beales, 1 Moo. & M. 416.

(*e*) Doe d. Chawner v. Boulter, 6 A. & E. 675.

(*f*) Thorpe v. Eyre, 1 A. & E. 926.

against the one who had previously received rent as landlord from the tenant. Notice of the award was given to the tenant, and with the sanction of the losing claimant the tenant was directed in future to pay his rent to the successful party as his landlord. Afterwards, the former landlord being dissatisfied with the award, distrained on the tenant for rent. It was held, in an action of replevin, that though the tenant is estopped from saying that his landlord had no title, the tenant here was at liberty to prove these circumstances in evidence, to show that his landlord's title had determined, and that the loser was estopped from setting up his title of landlord, having himself induced the tenant to pay rent to another person (*g*).

Evidence impeaching award.

IV. *Impeaching by evidence award put in evidence.*]— When an award is tendered in evidence the opposite party may offer evidence in reply to impeach its validity, and so doing away with its binding effect, allow proof to be given of the matters professed to be determined by it (*h*). Thus, an award on a reference of all matters in difference being offered in evidence by the defendant, the plaintiff is at liberty to prove, that on some of the matters referred the arbitrator has not awarded (*i*).

Proving matter not awarded on.

Issues undecided.

To illustrate this principle further, it may be observed, that though a submission by rule of court referring an action and an award determining the action generally is primâ facie evidence of a good award, yet evidence may be offered by a defendant under a plea of "no award," to show that there are several issues in the action referred, which the award has not determined, consequently that it is not final, and therefore of no effect (*k*).

Showing matter not within reference.

The court will grant a new trial if the judge at Nisi Prius reject evidence offered to show that the subject matter of the

(*g*) Downs v. Cooper, 2 Q. B. 256.

(*h*) Whitehead v. Tattersall, 1 A. & E. 491.

(*i*) Ingram v. Milnes, 8 East, 444.

(*k*) Dresser v. Stansfield, 14 M. & W. 822.

action to which the award is offered as an answer was not included in the reference or determined by the award (*l*).

Evidence to contradict award.

In an old case, however, where the defendant in mitigation of damages put in evidence a release by the plaintiff, made in pursuance of an award on a submission between the plaintiff and another, the court would not allow the plaintiff to give evidence to contradict the general terms of the award and release, which included the ground of action, and to show that the arbitrators had on certain grounds refused to take into consideration the claim in the action (*m*).

Evidence of misconduct or mistake of arbitrator inadmissible.

The same principle which prohibits the pleading the mistake or misconduct of the arbitrator precludes the defendant from giving evidence on those grounds (*n*), and in an action on an award from going into evidence to unravel the accounts exhibited to the arbitrator, and so dispute the correctness of his decision (*o*).

The question whether in an action for £246 the defendant was entitled to a set-off for the like sum of £246 in respect of some silk, having been submitted to the arbitrator, and decided in the negative by the award, the defendant in an action on the award to which he had pleaded a set-off, proposed to give evidence of a claim for the silk less than £246, and to show that the arbitrator had decided against his claim, simply because he had held himself bound by the words of the submission to decide against the defendant, unless a set-off was proved of the exact value of £246: the court, however, rejected the evidence, holding that in an action on the award the decision of the arbitrator could not be impeached for a mistake (*p*).

In one instance at Nisi Prius in an action of assumpsit on the award, the defence relied on was, that the irregular conduct of the umpire in examining one of the parties in the absence of the other vitiated the award. No objection, however,

(*l*) Ravee v. Farmer, 4 T. R. 146.

(*m*) Shelling v. Farmer, 1 Stra. 646.

(*n*) Wills v. Maccarmick, 2 Wils. 148; Dyer v. Dawson, cited in Heming v. Swinnerton, 1 Coop. C. C. 420, notes.

(*o*) Swinford v. Burn, Gow, N. P. 5.

(*p*) Johnson v. Durant, 2 B. & Ad. 925.

seems to have been made on the part of the plaintiff to the reception of the evidence or to the nature of the defence (*q*).

Evidence submission obtained by fraud of party.

It was said, in a case decided previous to the new rules of pleading, that, if the submission were obtained by fraud, and an action were brought on the award, the defendant might plead no submission, and prove the fraud in evidence, which would authorize him to treat it as no submission; or that he might plead no award, and show that the submission was obtained by fraud (*r*). But he could not, it seems, under any plea, be permitted to give evidence that the award was made as it was, in consequence of fraudulent conduct of the parties interested (*s*).

Proving no liability under award.

A submission provided that if the arbitrator should award that the defendants, who were executors, should purchase the plaintiff an annuity, he should and might award it with a proviso, that in case of a deficiency of assets the sum should abate. The arbitrator awarded the annuity without any proviso. On the general issue in assumpsit on the award, before the new rules, the court allowed the defendants to prove a deficiency of assets, holding that the arbitrator ought to have inserted the proviso, and that the defendants ought not to be the worse off for his neglect (*t*).

(*q*) Matson v. Trower, Ry. & M. 17.

(*r*) Sackett v. Owen, 2 Chitt. 39.

(*s*) Dyer v. Dawson, cited in Heming v. Swinnerton, 1 Coop. C. C. 420, notes.

(*t*) Crump v. Adney, 1 C. & M. 355.

CHAPTER IV.

THE AWARD AS A GROUND OF PROCEEDINGS OR DEFENCE IN EQUITY.

Contents of the fourth chapter.

In what cases and in what manner an award can be rendered available in equity the present chapter endeavours to point out.

In the first section the inquiry is made, when a bill will lie to have specific performance of an award decreed.

The second section sets forth the effect of an award as a plea in bar of a bill in equity respecting the matters referred, or of a bill to set the award aside.

The third section discusses the more summary modes in which the assistance of equity to enforce an award may be obtained.

SECTION I.

ENFORCING AN AWARD BY BILL IN EQUITY.

Whatever the submission a bill may lie.

1. *When a bill in equity will lie.*]—Whatever be the nature of the submission the jurisdiction of equity over the award seems to attach.

Though the submission be by order of Nisi Prius, which is afterwards made a rule of a court of common law, and so performance capable of being enforced by attachment from that court, Chancery may still entertain a bill for specific execution of the award (*a*). Even where the submission is by agreement containing a clause for making it a rule of a court of law under the statute, so that the Court of Chancery has no jurisdiction to set the award aside, yet a bill for specific performance may be filed when the award is such as equity will execute (*b*).

Performance of award enforced as of a contract.

A bill in equity will lie to enforce specific performance of an award, when the thing ordered by the award to be done is such as a court of equity would specifically enforce if it had been agreed upon by the parties themselves. For as by the submission the parties have contracted to do what the arbitrator shall direct, when the latter has made his decision, the award is considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and will be enforced against a party as the party's own agreement (*c*).

Not award for payment of money.

As equity will not interfere in the case of a breach of contract when a court of common law can give a complete remedy by damages, so it will not execute an award which directs nothing but the payment of money, any more than it would decree specific performance of a contract for such a purpose (*d*).

Award to do specific acts.

But when the arbitrator directs a party to perform anything in specié, as to make a lease or to convey an estate, or to do anything in respect of lands, a court of equity will execute the award as a common agreement (*e*).

Old rule, ratification or part performance requisite.

Formerly it was held, that when the submission was by private agreement out of court, the courts of equity would not entertain a bill for a specific performance of the award,

(*a*) Wood v. Griffith, 1 Wils. C. C. 34; S. C. 1 Swanst. 43.

(*b*) Walters v. Morgan, 2 Cox, 369.

(*c*) Walters v. Morgan, 2 Cox, 369; Wood v. Griffith, 1. Wils. C. C. 34; S. C. 1 Swanst. 43; Gervais v. Edwards, 2 Dru. 8 War. 80.

(*d*) Walters v. Morgan, 2 Cox, 369; Hall v. Hardy, 3 P. W. 187.

(*e*) Walters v. Morgan, 2 Cox, 369; Hall v. Hardy, 3 P. W. 187.

(though it contained directions other than for the payment of money,) unless after it had been made the parties had acquiesced in it, or agreed to execute it, or one party had performed his part (*f*). And so late as the year 1704, a bill being exhibited to have execution of an award which had been performed by neither party, a demurrer was allowed, on the ground that there was no precedent that a court of equity had ever carried such awards into execution (*g*).

Award enforced on part performance.

But when there has been a part performance, the courts of equity from very early times have felt justified in decreeing a complete execution.

Thus, in Charles the Second's time, where a bill to enforce an award on a submission out of court had been dismissed on demurrer by the Master of the Rolls; Lord Chancellor Jeffries on a rehearing reversed the decision, and decreed, that as the award had been part executed and assented to, it should be confirmed, and that the defendant should perform the same (*h*). So where land had been enjoyed under an award, the court confirmed the title of the plaintiff, and decreed a perpetual injunction against a lease, under which the defendant had commenced an action of ejectment (*i*). On the same principle, it was held on awards by private submission directing one party to convey an estate or to deliver a lease, and the other to pay a sum of money, that a bill would lie when the lease had been delivered up to enforce performance of the rest of the award (*k*), and on the other hand, to compel a conveyance when the defendant had received the money in consideration whereof he was to have conveyed the estate (*l*).

Though an award be not good in strictness of law, yet if there has been an assent, and a part performance, the Court of Chancery has sometimes enforced it (*m*).

(*f*) Bishop v. Bishop, 1 Rep. in Chanc. 75, 141; Thompson v. Noel, 1 Atk. 60; Eyre v. Good, 2 Rep. in Chanc. 18, 34.

(*g*) Bishop v. Webster, 1 Cas. in Eq. Ab. 51, pl. 9.

(*h*) Norton v. Mascall, 2 Rep. in Chanc. 304.

(*i*) Poole v. Pipe, 3 Rep. in Chanc. 11, 20.

(*k*) Church v. Roper, 1 Rep. in Chanc. 75, 141.

(*l*) Hall v. Hardy, 3 P. W. 187.

(*m*) Norton v. Mascall, 2 Vern. 24.

In an old case, an award ordered that a party should have certain lands, and that if any doubts arose the arbitrators would explain the same. Long after the award had been executed, and possession of the lands delivered pursuant to it, it was contended that the party only took a life interest under the award; but the arbitrators having declared that they meant to give him a fee, and that the word "heirs" had been left out of the award by mistake, the court decreed that the plaintiff, the purchaser from the party entitled by the award, should enjoy the land absolutely in fee (*n*).

In another case, where the plaintiff had paid part, and tendered the rest of the amount awarded due for a mortgage debt, but not within the time specified by the award, and brought a bill to have a re-conveyance of the mortgaged lands pursuant to the award; the court, as the period fixed for payment had elapsed before the plaintiff had paid the money, decreed that the award was to be dissolved, that the Master, allowing for the money paid, should ascertain what was due to the defendant, and that the defendant, on payment to him of what the Master found due, should re-convey the estate (*o*).

Offering penalty in lieu of performance.

Where an agreement for the sale of lands, at a price to be fixed by arbitration, is secured by a penalty, the court of equity, after the price is determined by the award, will decree a specific performance of the contract, and not compel the purchaser to accept the penalty in discharge of it (*p*).

Proceedings in court of law no bar to bill.

The circumstance that the Court of King's Bench had granted an attachment against the defendant for non-performance of the award, in refusing to execute an authority to sell an estate, and had discharged the attachment on receiving their officer's report that the defendant had not been guilty of a contempt, is no ground to prevent the Court of Chancery decreeing a specific performance (*q*).

Lapse of time no bar.

Mere lapse of time seems no bar to the right to have the

(*n*) Scott v. Wray, 1 Rep. in Chanc. 45, 85.

(*o*) Ewes v. Blackwall, Cas. temp. Finch. 22.

(*p*) Belchier v. Reynolds, 2 Ld. Kenyon, Part 2, 87.

(*q*) Wood v. Griffith, 1 Wils. C. C. 34; S. C. 1 Swanst. 43.

assistance of equity; specific performance of an award was decreed in Chancery, though twelve years had elapsed since the award had been made (*r*).

Scire facias on submission by recognisance.

On a submission by recognizance, an award has sometimes been enforced in equity by scire facias on the recognizance (*s*).

Directions invalid in law.

II. *When award invalid or inequitable.*]—Directions in an award, which are contrary to law, cannot be enforced in equity. If the parties agree by parol that the arbitrator shall determine whether a long lease shall be granted of certain premises, and he direct a lease to be made; though the award be in writing, the agreement is within the Statute of Frauds, and specific performance of that part of the award which awards the lease cannot be enforced (*t*).

Statute of Frauds.

Directing a perpetuity.

Where an award directed, among other things, that the defendant should enjoy an estate tail in certain lands, but should do no act to bar the plaintiff's reversion in the same; the court refused to decree the restraining clause of the award, on the ground that Chancery would not decree a perpetuity, and held the defendant's demurrer as to that part to be good (*u*).

Unreasonable award.

Though equity will not compel the specific performance of an *agreement* it deems unreasonable, it will nevertheless enforce an *award*, although it may consider it unreasonable; for the parties give to the act of an arbitrator an authority which cannot be given to their own acts (*x*).

Inequitable award.

In an old case, however, Lord Nottingham, C., said that on a reference by order of Chancery, if the award appeared inequitable, the court would not decree it. And where exceptions were taken to an award, and the other side moved that it might be decreed, the Lord Chancellor set it aside,

(*r*) Sweet v. Hole, Cas. temp. Finch, 384.

(*s*) Carter v. Carter, 1 Vern. 259.

(*t*) Walters v. Margan, 2 Cox, 369.

(*u*) Bishop v. Bishop, 1 Rep. in Chanc. 75, 141.

(*x*) Wood v. Griffith, 1 Wils. 34; S. C. 1 Swanst. 43.

as it ordered payment to an infant, and that a bond should be given by the guardian, that the infant, when at full age, should convey certain lands, the learned judge holding it unreasonable, on the ground that the infant might die or refuse to convey, and that so it was not mutual. He also added he would never decree an award which should bind an infant (*y*).

Affecting infant.

In the following case, however, the award was decreed good. There was a submission by the plaintiff, on the one part, and the defendant, an infant, and his guardian, on the other part; and the arbitrator awarded that during the plaintiff's life and the infant's minority, the plaintiff and defendant should be at liberty promiscuously to dig lead ore from certain mines, and that the profits should be divided equally between them. A bill was brought to confirm the award, and the same Lord Chancellor being of opinion that the infant was bound by it, indemnified the trustees for what they had done, and decreed according to the prayer of the bill, that the award should be established (*z*).

Affecting married woman's lands.

A specific performance of an agreement to sell an estate at a price determined by an arbitrator, was in one instance refused, where some of the parties to be bound were married women, (one of whom also had not executed the submission,) and the valuation did not appear to have been made with due care and attention, which were more especially requisite when the estate of a married woman was intended to be taken away from her (*a*).

In another case, the defendant, on certain terms, agreed to set out for the plaintiff a piece of land to build on. After the plaintiff had built on it, the defendant refused to confirm the agreement, and the matter was referred to arbitration. On a bill to enforce the agreement and the award, which directed the defendant to convey the land, the defend-

(*y*) Cavendish v. ——, 1 Cas. in Chanc. 279; S. C. 1 Eq. Cas. Ab. 50; Evans v. Cogan, 2 P. W. 450.

(*z*) Bishop of Bath and Wells v. Hippesley, cited in Harvey v. Ashley, 3 Atk. 607.

(*a*) Emery v. Wase, 5 Ves. 846; S. C. on appeal, 8 Ves. 505. See P. 1, ch. 2, s. 1, d. 3, p. 23, forcing husband to procure wife's conveyance.

ant pleaded to the award, that he and his wife were jointly seised of the land, and that she was no party to the submission. The court held this a good plea in bar to the award, but nevertheless decreed that the defendant should convey the land according to the agreement (*b*).

Subsequent consent of strangers to award.

In general, strangers to the submission cannot be affected by the award, but where they have consented subsequently to be bound by its terms, equity, it seems, will enforce it against them.

Where an award directed a widow tenant for life of lands under her husband's will, to convey them in fee, and her married daughters, who were entitled to the reversion in fee, though not parties to the reference, afterwards assented to the award; the Lord Chancellor, on a bill being brought, after the mother's death, against the daughters and their husbands, to have the award enforced, held that the consent of the daughters, as they were married, could not bind them, (though if they had been sole they would have been bound,) and he refused to compel them to convey the lands (*c*).

Laches of stranger.

In one case, a party having a claim on property which he knew was the subject of a reference between the plaintiff and defendant, having suffered the award to be made without bringing forward his claim, was held to be bound by the award, and the plaintiff was decreed entitled to a specific performance of the award, without any consideration for the rights of the stranger (*d*).

Stranger cannot enforce award.

A stranger to the submission cannot avail himself of the award.

On a submission out of court between two partners, the award ordered some wines, part of the stock in trade of the firm, to be deposited in the hands of a third party, to be delivered to the partners respectively, in proportion to the amount of the debts of the firm each should pay off. The moiety of the wines having been seized in execution on a judgment in an action against one of the partners for a

(*b*) Berry v. Wade, Cas. temp. Finch, 180. 450.

(*c*) Evans v. Cogan, 2 P. W. 1.

(*d*) Govett v. Richmond, 7 Sim.

private debt, it was held no bill would lie at the suit of the partnership creditors to set aside the execution, and to have the benefit of the award by having the wines again deposited in the hands of the third person, since the creditors were no parties to the submission (*e*).

Demurrer to bill setting forth void award.

If on a bill to enforce an award, the award appear bad on its face, as for uncertainty, the objection to its validity may be taken on a general demurrer to the bill (*f*). So if there be an illegal direction in the award, not vitiating the rest of it, a demurrer will be allowed to so much of the bill as prays the performance of the award in that respect (*g*).

SECTION II.

PLEADING AN AWARD IN BAR TO A BILL IN EQUITY.

Pleading award to bill to set it aside.

An award may be pleaded in bar to a bill which seeks to disturb the matter submitted to arbitration.

It may also be pleaded to a bill to set aside the award and open the account (*a*).

To merits and discovery.

A plea of an award is not only good to the merits of the case, but to the discovery sought by the bill, for a defendant to the bill is not obliged to set out the whole account between himself and the plaintiff, after an award in his favor in relation to that very account; for that is conclusive on all parties till an error is shown in taking the account, or partiality, or improper conduct in the arbitrator (*b*).

(*e*) Thompson v. Noel, 1 Atk. 60.

(*f*) Hopcraft v. Hickman, 2 S. & S. 130.

(*g*) Bishop v. Bishop, 1 Rep. in Chanc. 75.

(*a*) Pusey v. Desbouvrie, 3 P. W. 315, per Ld. Talbot, C.; Farringdon v. Chute, 1 Vern. 72.

(*b*) Tittenson v. Peat, 3 Atk. 529.

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Whether the award made after bill filed pleadable.

Some discussion has arisen on the question, whether an award made under an agreement, entered into after the bill has been filed, to refer the matter of the suit to arbitration, can be set up in bar to the bill by plea put in, in the nature of a plea puis darreign continuance at law. This point was much considered by Lord Eldon in *Rowe* v. *Wood* (*c*), and his opinion appears to have been eventually adverse to such a form of proceeding, the effect of which he considered might have been much more effectually obtained by a motion to stay proceedings in the cause. In *Dryden* v. *Robinson* (*d*), the question was again raised, and although in the marginal note it is stated as the opinion of the court that an award made under such circumstances may be pleaded, yet upon reference to the case it will be found that no such decision was come to. After the bill was filed, some of the parties had agreed to refer the subject of the suit, and an award was made; but as all the parties to the suit were not parties to the submission, although the plaintiff was a party to it, and as part of the prayer of the bill was for the execution of the trusts of a deed, under which some of the parties to the suit were interested, who were not parties to the submission, a plea of the award was ordered to stand for an answer, with liberty to except (*e*). The case, therefore, of *Dryden* v. *Robinson* (*f*), it is said, can hardly be considered as an authority, especially in the face of the decision of *Rowe* v. *Wood* (*g*), confirmed as the latter was by the House of Lords on appeal (*h*). It should, however, be observed, that in *Rowe* v. *Wood* (*i*), there was only an agreement pleaded, some of the terms of which were to be settled by arbitration, but there was no averment that any award had been made.

Denying by plea and answer cor-

If the bill to set aside the award impeach it on the ground of fraud, corruption, or mistake, whether of the arbitrator or

(*c*) 1 J. & W. 315; S. C. 2 Bligh, P. C. 595. See 1 Daniell's Chanc. Pract. by Headlam, 637.

(*d*) 2 S. & S. 529.

(*e*) Dryden v. Robinson, 2 S. & S. 529.

(*f*) 2 S. & S. 529.

(*g*) 1 J. & W. on appeal, 2 Bligh, P. C. 595.

(*h*) 1 Daniell's Chanc. Pract. by Headlam, 637.

(*i*) 1 J. & W. 315, 2 Bligh, P. C. 595.

of a party, those charges must be denied both by averments in the plea, and by an answer in support of it; and every other matter stated in the bill as a ground for impeaching the award must be denied in like manner (*k*).

Corruption charged in bill.

It has often been laid down that to a bill stating corruption of the arbitrator, a plea of the award merely, leaving the charge of corruption untouched, is insufficient (*l*), and that an award nakedly pleaded is an "exceptio ejusdem rei cujus petitur dissolutio," and is therefore no bar without the denial of the corruption and partiality.

Whether plea of award good, corruption denied in answer only.

Thus, where a bill charged the defendant with fraudulent concealment and deception of the arbitrator, and the defendant pleaded the award alone, and did not put in any answer, the court held it impossible that the plea could be allowed, as the fraud was not denied (*m*).

Some doubt has been thrown on the propriety of averments denying the matter charged in the bill being put into the plea, for the Court of Exchequer in two instances (*n*), where the bills were filed for the purpose of setting aside awards, charging that they had been obtained corruptly, and pleas were put in setting up the award, and negativing the charges of corruption, held the pleas to be bad, as not bringing the cases to one point, and said the plea should merely set up the award, and not contain averments denying the charge of corruption, but that the answer supporting the pleas should deny those charges. On a subsequent occasion, however, Lord Eldon, C., expressed his disapprobation of the ruling of the Court of Exchequer in those cases (*o*), saying it was difficult to support those cases, and "that there was hardly one point of equitable proceedings with regard to pleas, which it was not extremely difficult to

(*k*) 1 Daniell's Chanc. Pract. by Headlam, 636, 637; Mitford's Plead. in Chancery, 304, 5th Ed.

(*l*) Evans v. Harris, 2 Ves. & B. 361, 364; Butcher v. Cole, cited in Edmundson v. Hartley, 1 Anst. 99.

(*m*) Gartside v. Gartside, 3 Anst. 735.

(*n*) Pope v. Bish, 1 Anst. 59; Edmundson v. Hartley, 1 Anst. 97.

(*o*) Bayley v. Adams, 6 Ves. 586.

reconcile to them" (*p*). It is apprehended, therefore, that the doctrine previously laid down, as cited from Ld. Redesdale, of the necessity of such averments, is the law at the present day (*q*).

On a bill to impeach an award and for an account against the arbitrators and the party, a plea by the latter of the award as to the account was held good, but the plea by the arbitrators of the submission, as to a discovery of several particulars, and as to relief against them, was overruled as covering too much, viz. several particulars which might tend to show partiality in their proceedings (*r*).

Answer must deny charges in the bill specifically.

The answer supporting the plea should specifically deny the charges in the bill impeaching the award.

If the defendant swear that the accounts taken by the arbitrators are true accounts, but do not answer to particular concealments and frauds charged in the bill, the court will overrule the plea (*s*).

Where to a bill to set aside an award, on the ground of collusion and want of notice to the plaintiff to attend at the making of the award, the plea stated the arbitration, that the plaintiff had full notice, that an agent from him attended, and that there was a full discussion before the award was made; and there was also an answer containing averments of the fairness of the transaction; Lord Kenyon, M. R., held the plea good (*t*).

On a bill to set aside an award, suggesting fraud of the arbitrator, the defendant pleaded the award, and insisted it was a fair award. The court, as the answer of the defendant was very loose, and the submission provided for amending any errors of the arbitrators, directed the plea to stand for an answer, with liberty to except (*u*).

(*p*) 1 Daniell's Chanc. Pract. by Headlam, 564; Bayley v. Adams, 6 Ves. 586, 598.

(*q*) Mitford's Plead. in Chanc. 304, 5th Ed.

(*r*) Godfrey v. Bercher, Vin. Ab. Arb. 139, pl. 38.

(*s*) South Sea Company v. Bumstead, 2 Eq. Cas. Ab. 80; S. C. 3 Vin. Ab. Arb. 140, pl. 39.

(*t*) Butcher v. Cole, cited in Edmundson v. Hartley, 1 Anst. 99.

(*u*) Kampshire v. Young, 2 Atk. 154.

To a bill to open an account for fraud, a plea of an award and release was ordered to stand for an answer, with liberty to except (*x*).

Plea of award and release.

After receiving the sum awarded, on a reference of all matters in difference, the plaintiff executed a general release, but afterwards brought a bill, suggesting that the arbitrator had awarded on one matter only, and praying for a general account as to all but that one matter. The defendant pleaded the release, but so informally that the plea was overruled, but the benefit of the plea was reserved to him at the hearing (*y*).

Award no plea for stranger to submission.

An award made, and a release given pursuant thereto, cannot be pleaded as a defence to a suit by those who are no parties to the submission (*z*).

SECTION III.

ENFORCING AN AWARD BY SUMMARY PROCEEDINGS IN EQUITY.

Making award in a suit an order of Chancery.

1. *Whether the award must be made an order of court before enforcement.*]—Much discussion has arisen as to whether when a reference is made by an order of the Court of Chancery, in a cause in that court, it is necessary to make the award an order of that court, before an order can be made founded on the arbitrator's directions.

In one instance, on a reference of all matters in difference, by an order of the Court of Chancery made in the

(*x*) Burton v. Ellington, 3 Bro. C. C. 196.

(*y*) Jones v. Bennett, 1 Bro. P. C. 528.

(*z*) Davis v. Rea, Cas. temp. Finch. 441.

suit, where the question was raised, and a search was made for precedents, Sir John Leach, V. C., relying on the case of *Sibley* v. *Saffell*, a decision of Lord Eldon, C., held that it was not necessary that the award should be made an order of court to justify an application for an order on the defendant to pay the amount awarded (*a*).

Held not necessary to make award order of court.

A motion that an award should be made a rule of Chancery, and that the court would direct payment pursuant to it, was held by Sir Anthony Hart, V. C., to be superfluous as to the former part. For that learned judge was of opinion, that when an order was made by any court, it was not necessary to give the court jurisdiction with respect to the award, that either the submission or the award should be made a rule of court, and that when the reference was by order of Chancery, the Court of Chancery would lend its aid to enforce the award, without the award itself being made a rule of that court (*b*).

On another occasion, upon a motion by the plaintiff that the defendant should pay the sum awarded, under a reference of all matters by order in the suit, and on a cross motion by the defendant that the award might be set aside, the point being mooted as to the necessity of making the award an order of court, Lord Lyndhurst, C., said it was not necessary (*c*).

In a learned note to a case in Chancery, the correctness of the above decisions in *Haggett* v. *Welsh* (*d*), *Ormond* v. *Kynnersley* (*e*), and *Turner* v. *Turner* (*f*), is stated to be considered as very doubtful; and it is said that there are few orders of reference made in a suit in Chancery which do not contain a clause (which has been in use for above a century) providing that either party shall be at liberty to apply to the court to have the award of the arbitrators made an order of court (*g*).

(*a*) Ormond v. Kynnersley, 2 S. & S. 15.

(*b*) Haggett v. Welsh, 1 Sim. 134.

(*c*) Turner v. Turner, M.S.S. case, cited in Heming v. Swinnerton, 1 Coop. C. C. 421, notes.

(*d*) 1 Sim. 134.

(*e*) 2 S. & S. 15.

(*f*) M.S.C. case, cited in Heming v. Swinnerton, 1 Coop. C. C. 421, notes.

(*g*) See notes to Heming v Swinnerton, 1 Coop. C. C. 421. See the

Held necessary to make award order of court.

The latest decision on the point supports the view last put forth, for on a petition, before Sir John Leach, M. R., to have money paid out of court pursuant to an award made under an order of Chancery, though all the parties entitled to the fund were before the court, and though the case of the *Marquis of Ormond* v. *Kynnersley* (*h*), his own decision, was cited as a direct authority, that learned judge refused to make an order for payment until the award had been made a rule of court, saying that the court must know judicially what the award was before it could act upon it (*i*).

Motion to make award order of court requires notice.

By an order of Chancery made in a suit, all matters in difference mentioned or referred to in the pleadings in the suit were submitted to arbitration, and it was ordered that either party should be at liberty to apply to the court to have the award made an order of court. The defendant gave notice of motion to have the award made an order of court, and that the plaintiff should pay a sum awarded. It was contended for the plaintiff that the motion to make the award a rule of court was a motion of course, and that the order for payment of the money could not be made until after the award had been made a rule of court, and the plaintiff been allowed an opportunity of moving to set it aside. The defendant argued that the motion was one requiring notice, and could only be met by a cross motion to impeach the award, and the above-mentioned cases were cited. Vice-Chancellor Wigram, after consultation with the registrars, and making inquiry respecting the practice, decided, that considering the consequences of making an award an order of court, it was necessary that the motion should be a special motion, and that it required notice, but in consequence of the previous uncertainty as to the practice, he allowed the plaintiff until the next term to make a cross motion to set aside the award (*k*).

Appendix of Forms for the form of an order of reference in a suit.

(*h*) 2 S. & S. 15.

(*i*) Salmon v. Osborn, 3 M. & K. 429.

(*k*) Wilkinson v. Page, 1 Hare, 276. See the Appendix of Forms for the forms of orders making awards orders of Chancery.

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Awards under the statute of William III., according to the usual practice, must be made orders of court before proceedings be taken to enforce them (*k*).

Making award under statute order of Chancery.

On a recent occasion, a submission under the statute of William and the award were made orders of Chancery by an ex parte application; notwithstanding which the court set the award aside for irregular conduct of the arbitrator (*l*).

Award cannot be made a record at law.

It may not be unimportant to observe that at common law there is no mode of proceeding known by which an award can be made a matter of record (*m*), but where the submission is made a rule of court, the court compels performance of the award just as if it were part of the rule (*n*).

Enforcing on motion award under statute of Will. III.

II. *Motion and petition to enforce award.*]—When the submission is by agreement to be made a rule of a court of equity under the statute of William III., the party neglecting or refusing to perform the award may, under the express provisions of the act, be compelled on motion to obey the directions of the arbitrator (*o*).

Award not a judgment or decree.

In the first case on the statute, decided in 1703, five years after the act passed, it was determined in Chancery, after consultation with the judges of the courts of common law, that the award on a submission under the statute was not in the nature of a judgment or decree, for the purpose of being enforced by any other summary process than the process of contempt given by the act; and that, therefore, as this dies with the person, the remedy under the statute was lost on the death of the party, and could not be enforced by scire facias against the heir or executor (*p*).

The steps to be taken (differing from those requisite for awards under orders in a suit) are as follow:—

Practice enforcing award under the statute.

Before any proceedings be commenced to enforce the

(*k*) 2 Smith, Chanc. Pract. 451, 3rd Ed. See next division.

(*l*) Harvey v. Shelton, 7 Beav. 455.

(*m*) Jones v. Williams, 8 M. & W. 349.

(*n*) Anon. 1 Salk. 71.

(*o*) 9 & 10 W. III. c. 15, s. 1.

(*p*) Webster v. Bishop, Prec. in Chanc. 223; S. C. 2 Vern. 444.

award, the submission must be made an order of court in the manner pointed out in the next chapter (*q*).

Submission and award must be made orders.

We have before stated that the usual practice requires that the award must be made an order of court before any steps can be taken to compel obedience (*r*).

Notice of motion to make award order.

To obtain the order making the award an order of court, a notice of motion must be given to the other parties, or counsel must consent on their behalf (*s*).

Cross motion to set aside award.

At this stage of the proceedings the party may impeach the award by a cross motion (*t*).

Service of award and demand of performance. Notice of motion for order to obey award.

After the submission and award have been made orders of court (*u*), a copy of the award should be personally served on the party liable, and performance demanded, either by the party entitled, or by some one acting under a power of attorney from him. If obedience be not then made to the award, a notice of motion for an order to direct the party to do that which he is awarded to do, within a certain fixed period, should be served on the recusant, according to the practice of the court (*x*).

Motion may be made in term or vacation.

The notice of motion may be given for any day in term, or for a seal day during the sittings out of term, or by special leave of the court first obtained, authorizing the party to give such notice, for any day in vacation (*y*). This leave may be obtained on an ex parte application.

Order to obey award within specified time.

On the day mentioned in the notice, or soon after, according to the practice of the court (*z*), in case the party served do not appear, the court will, on affidavit of the service of the copy of the award, of the demand of the performance, of the non-performance, and of the service of the notice of

(*q*) See second section, p. 551. Harvey v. Shelton, 7 Beav. 455.

(*r*) 2 Smith, Chanc. Pract. 451, 3rd Ed.; Harvey v. Shelton, 7 Beav. 455. See the preceding division, p. 538.

(*s*) 2 Smith, Chanc. Pract. 452, 3rd Ed.; Wilkinson v. Page, 1 Hare, 276.

(*t*) Wilkinson v. Page, 1 Hare, 276.

(*u*) See Appendix for the Tabular statement of the steps required for the summary enforcement of awards in equity.

(*x*) 2 Smith, Chanc. Pract. 1st Ed. 399, 3rd Ed. 458; 2 Daniell's Chanc. Pract. by Headlam, 1456; Smith's Handbook of Chancery Practice, pp. 45, 59.

(*y*) 2 Daniell's Chanc. Pract. by Headlam, 1453, 1454.

(*z*) 2 Daniell's Chanc. Pract. by Headlam, 1459.

motion, make an order directing the party to do what the award directs within a specified time (*a*).

Personal service of the order.

When the above-mentioned order has been obtained, a copy of it must be served personally on the recusant.

Notice of motion to obey or be committed.

If he still fail to obey, notice of motion for an order on him to perform what the award directs within four days after service thereof, or to stand committed to the Queen's prison, must be served on him.

Order to obey or to stand committed.

On affidavit of the service of the first order, of the demand, of the disobedience, and of the service of the last-mentioned notice of motion, an order will be drawn up in accordance with such notice.

Order absolute for committal.

Upon affidavit of personal service of such last-mentioned order, of a fresh demand and non-payment, the applicant is entitled to an order, upon a motion as of course, that the recusant do stand committed until he shall have done the act which the award requires him to do. This order is drawn up, and the recusant committed to the Queen's prison accordingly (*b*).

Party imprisoned until he obey.

There he is confined until he purge his contempt by obedience to the award, and pay the costs of his contempt (*c*).

Enforcing on motion award under order of equity in a suit.

When the submission is by order of a court of equity made in a suit, performance of the award may be enforced in a summary manner.

Making award order of court.

We have seen in the preceding division that the later decisions of the courts hold it necessary to make the award an order of court before taking steps to enforce it (*d*).

The mode of enforcing is the following:—

Notice of motion. Order of court to perform award.

A notice of motion is given for an order on the party to perform the award, specifying what he is required to do. On affidavit of the service of the notice, an order will be

(*a*) 2 Smith's Chanc. Pract. 1st Ed. 399, 3rd Ed. 458; 2 Daniell's Chanc. Pract. by Headlam, 1025.

(*b*) Smith's Hand Book of Chanc. Pract. 45. The order is thus drawn up: Ex relatione of an officer of the Registrar's Office.

(*c*) 1 Smith's Chanc. Pract. 208, 3d Ed.

(*d*) See ante, pp. 537, 538.

made directing him to do the acts awarded within a specified time (*e*).

Enforced as other orders in a suit.

This order will be enforced by the process of the court in the same manner as other orders or decrees in a suit. A statement of the general mode of proceeding in such cases being foreign to the object of this work, and being to be found in the works on the practice of the Court of Chancery, it may be sufficient shortly to mention, that the order must be duly served according to the practice (*f*), and that if obedience be not paid to it within the time limited an attachment may be issued, (either in term time or vacation,) without any order of the court, upon production to the Record and Writ Clerk of an affidavit of the due service of the order (*g*).

Service of order.

Attachment on disobedience.

Party attached committed to prison.

The party, when taken on the writ of attachment, is committed to prison (*h*).

Sequestration against his goods and effects.

If he be not taken on the writ, or if, after being taken or detained in custody on the same, he still fail to obey, the party prosecuting the writ is entitled to a commission of sequestration against the recusant's estate and effects (*i*).

Serjeant-at-arms.

If the sheriff fail to apprehend him, an order may be obtained as of course, on the production of the writ with the return non est inventus, for the Serjeant-at-arms to apprehend him (*k*).

Writ of assistance to enforce award in a suit.

If the award order the party to deliver up possession of land, and he fail to do so after having been served with the order to obey the award in a specified time, an order may be obtained as of course for a process called a writ of assistance, which is directed to the sheriff, and which orders that officer to deliver possession to the party obtaining it(*l*).

Whether the award be made in a suit, or on a submission

(*e*) 2 Smith, Chanc. Pract. 3d Ed. 458; 2 Daniell's Chanc Pract. by Headlam, 1025.

(*f*) 2 Daniell's Chanc. Pract. by Headlam, 1025.

(*g*) 2 Daniell's Chanc. Pract. by Headlam, 1026; Bac. Ab. Arb. H.; Hide v. Petit, 1 Cas. in Chanc, 91, 185. See Knox v. Simmonds, 3 Bro. C. C. 58.

(*h*) 2 Daniell's Chanc. Pract. by Headlam, 1026.

(*i*) 2 Daniell's Chanc. Pract. by Headlam, 1027.

(*k*) 2 Daniell's Chanc. Pract. by Headlam, 1027.

(*l*) 2 Daniell's Chanc. Pract. by Headlam, 1051.

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under the statute of William III., the recent statute 1 & 2 Vict. c. 110, s. 18, gives a speedy and summary method of enforcing payment of money awarded (*m*).

Enforcing payment of sum awarded under stat. of Victoria.

That section gives to all decrees and orders of courts of equity, whereby any sum of money, costs, charges, or expenses shall be payable to any person, the effect of judgments in the superior courts of common law.

Fieri facias and elegit under orders of Chancery.

By virtue of the orders of the Court of Chancery made in pursuance of the provisions of this statute (*n*), the party who is entitled to the sum awarded, and who has obtained an order for payment, may, after the lapse of one month from the time when such order for payment was duly passed and entered, sue out a writ of *fieri facias* or *elegit* for the amount (*o*).

Motion to pay money out of court.

The Court of Chancery will not generally order money to be paid out of court upon motion, the proper mode of obtaining it being by petition; but where the rights of the parties in a cause had been ascertained by arbitration, though no decree had been made, the payment of money out of court was ordered upon motion (*p*).

Motion by defendant to dismiss plaintiff's suit pursuant to award.

On a reference by bond made a rule of a court of common law, the arbitrator directed that all suits in law and equity should be discontinued. The defendant moved in the Exchequer that a suit in equity in that court be dismissed pursuant to the award. The court, however, said they could not act on the award, and that if the plaintiff refused to dismiss his bill, if that were the meaning of the award, the remedy against him was by attachment in that court of which the submission was a rule (*q*).

Enforcing award in charity suit on petition.

The Court of Chancery will not act under an award made in a charity cause, without the consent of the Attorney-General, or a reference to the Master to see whether it is for

(*m*) See P. 3, ch. 7, as to proceeding on the Statute at Common Law.

(*n*) General Orders, May 10, 1839.

(*o*) Smith's Hand Book of Chanc. Pract. 45, 369; 2 Daniell's Chanc. Pract. by Headlam, 1013.

(*p*) Smith's Hand Book of Practice in Chancery, 56; Oliver v. Burt, 1 Beav. 583; Bromley, In re, 13 L. J. Ch. 320.

(*q*) Hutchison v. Hodgson, 2 Anst. 361.

the benefit of the charity; and Lord Eldon, C., observed, that in these cases where the information cannot be filed without the consent of the Attorney-General, the same principle requires his authority and consent throughout (*r*).

In another case affecting a charity, the same learned judge remarked, that formerly the Court of Chancery was more in the habit of giving effect to awards than at this day it is accustomed to do (*s*).

Charitable corporation compelled to renew lease.

An information having been filed against a charitable corporation, the matters in the suit were referred to arbitration. The award made and confirmed by decree of court, in 1716, ordered the corporation to grant certain leases on lives renewable on fines. A petition having been presented, in 1823, before Lord Eldon, C., to compel the corporation to renew a lease pursuant to the award, the Lord Chancellor expressed great doubts whether, in the case of a charity, he had any jurisdiction to enforce the award, yet nevertheless directed the lease to be granted, as the lands had been enjoyed under the award ever since it had been made; and as Lord Hardwicke, C., had twice assumed the jurisdiction, and acted on the very award under similar circumstances, he should, notwithstanding his own doubts, consider the award as not to be disturbed except by the House of Lords (*t*).

(*r*) Attorney-General v. Hewitt, 9 Ves. 232. See stat. 52 Geo. III. c. 101, as to the summary powers of the Court of Chancery in charity cases.

(*s*) Attorney-General v. Clements, 1 Turn. & R. 58.

(*t*) Attorney-General v. Clements, 1 Turn. & R. 58.

CHAPTER V.

MAKING THE SUBMISSION A RULE OF COURT.

PART III. CH. V. S. 1.

Subject of the fifth chapter.

THIS chapter is confined to setting forth the practical steps to be taken in the preliminary proceeding of making the submission a rule of court.

Section one treats of making the submission a rule of a court of law.

Section two, of making it a rule of Chancery.

In section three the practice, both at law and equity, of making the submission or appointments of the arbitrators a rule of court under "The Lands Clauses Consolidation Act" is considered.

SECTION I.

MAKING THE SUBMISSION A RULE OF A COURT OF LAW.

Making submission a rule before proceeding on award.

Before proceeding to enforce the award by the summary process of the courts, or to set the award aside, the submission, whether by common law or under the statute of Wil-

liam, must be made a rule of Court, for the courts have no summary jurisdiction until that be done (*a*). It has been before observed that a mere verbal submission cannot be made a rule (*b*).

When to be made a rule.

This step of making the submission a rule of court may be taken by either party at any time, whether before or after the award has been made, whether he has possession of the award or not, whether his object be to enforce or to impeach the award, and when with a view to enforce it, although the time for applying to set it aside has elapsed. There is no difference in the practice of the courts of law and equity in this respect (*c*).

Same practice in law and equity.

Drawing up rule nunc pro tunc.

For the purposes of justice the courts will sometimes permit the submission to be made a rule of court of a term anterior to the date of the application for the rule. When the submission is made in a cause by the common law jurisdiction of the courts, their power to draw up the rule "nunc pro tunc" seems clear; but when their jurisdiction over the submission is derived solely from the statute of William III. it is doubtful whether they have authority thus to antedate the rule for the purpose of enabling a party to question the validity of the award either by rendering valid a previous motion to set it aside, or by permitting one to be made "nunc pro tunc" after the time given by the statute for such an application has elapsed (*d*).

Submission in an action.

When the submission is by judge's order, or order of Nisi Prius, either party can at any time, in term or vacation (*e*),

(*a*) Harrison v. Grundy, 2 Stra. 1178: Perring & Keymer, In re, 3 Dowl. 98; Davis v. Getty, 1 S. & S. 411; Harvey v. Shelton, 7 Beav. 455; Mayor of Bath v. Pinch, 4 Scott, 299; Bottomley v. Buckley, 4 D. & L. 157; Kirkus v. Hodgson, 8 Taunt. 733; S. C. 3 Moore, 64; 2 Archb. Pract. 1260, 7th Ed.; Ross v. Ross, 16 L. J., Q. B. 138; S. C. 4 D. & L. 648.

(*b*) Ansell v. Evans, 7 T. R. 1; — v. Mills, 17 Ves. 419.

(*c*) Smith v. Symes, 5 Madd. 75; Pownall v. King, 6 Ves. 10; Fetherstone v. Cooper, 9 Ves. 67; Heming v. Swinnerton, 16 L J. Ch. 287; Taylor, In re, 5 B. & A. 217; Nichols v. Ros, 3 M. & K. 431; Ross v. Ross, 16 L. J., Q. B. 138.

(*d*) Smith v. Blake, In re, 8 Dowl. 133. See also P. 3, ch. 9, s. 2, d. 1, as to the time for setting aside an award under the statute.

(*e*) Taylor, In re, 5 B. & A. 217.

by application to the court in which the action is brought, make it as of course a rule of court. The power of the courts to make such submissions rules of court does not arise from any statute, but depends on the inherent jurisdiction they possess over judicial proceedings before them (*f*). On one occasion, where a cause was referred by agreement in writing, out of court, though it contained no clause for making the submission a rule of court, it is reported that it was permitted to be made a rule (*g*). There does not, however, seem to have been any objection taken.

Practice making submission rule.

The course adopted on a reference by order of a judge or of Nisi Prius is simply to annex the order of reference to the motion paper given to counsel. No affidavit is necessary, unless there has been an enlargement of the time by the arbitrator. In vacation as well as in term there must be a motion paper signed by counsel. The rule in each case is absolute in the first instance (*h*).

Submission under the statute. Affidavit of execution.

In order to make a submission by agreement under the statute 9 & 10 W. III. c. 15, a rule of court, an affidavit of its due execution must, according to the provisions of the Act, be made in the court of which it is agreed to be made a rule by one of the witnesses to it (*i*).

Bond executed by opponent made rule.

If the submission between two persons be by mutual arbitration bonds, it is sufficient on moving to make the submission a rule of court for the applicant to produce the bond executed by the other party (*k*).

When execution of all parties to be verified.

So if the submission be by two similar agreements, of which each holds the part signed by his opponent, and one wishes to make the part in his possession a rule of court, the practice in the Queen's Bench rule office is to require an affidavit of the execution of the one party only whose signature is appended to the part sought to be made a rule. But

(*f*) Aston v. George, 2 B. & A. 395.

(*g*) Little v. Newton, 1 M. & G. 976.

(*h*) 2 Archb. Pract. 1256, 7th Ed. See the Appendix of Forms for the forms of the rules.

(*i*) 9 & 10 W. III. c. 15, s. 1. See the Appendix of Forms for the form of the affidavit.

(*k*) Rudd v. Coe, Barnes, 55.

where several parties have signed a single agreement or deed of submission, the rule will not be drawn up without affidavits verifying the execution of all the parties (*l*).

Compelling attesting witness to make affidavit.

According to some authorities, if the attesting witness refuse to make the necessary affidavit he will be compelled by the court to do so (*m*), on the ground that though it is generally true that a party cannot be compelled to make an affidavit, and though there are no compulsory words in the statute, yet as the statute renders the affidavit necessary, a person by subscribing his name as a witness must be considered to have undertaken to give evidence at a proper time and in a proper manner, and the refusing to do so is an injury to the parties to the submission in a matter belonging to the jurisdiction of the court (*n*).

On one occasion, where the object was to move to set aside the award, the court granted such a rule, but refused to grant more than a rule nisi, though the witness' name had been discovered only the day before, and the term within which the party was bound to move to set aside the award had nearly expired (*o*).

In a very recent case a judge made an order "that A. B. (the attesting witness) should forthwith attend and swear a certain affidavit tendered to him as to the execution of the agreement of reference herein;" and the witness accordingly attended at the judge's chambers (*p*).

Practice making agreement of reference a rule.

The affidavit when made should be annexed to the submission, and in term time given to counsel with a motion paper to move to make the submission a rule of court. This is a motion of course, and absolute in the first instance. No notice need be given to the other side, though very recently after the statute of William III. passed, it seems to have been thought requisite (*q*); for it is a mere matter of

(*l*) Ex relatione, of the officers of the Rule Office of the Court of Queen's Bench.

(*m*) Clarke v. Elwick, 10 Mod. 332; S. C. 1 Stra. 1; Weston v. Faulkner, 1 Price, 308; Anon. Barnes, 58.

(*n*) Clarke v. Elwick, 10 Mod. 332.

(*o*) Todd, Ex parte, W. W. & D. 577.

(*p*) Ross v. Ross, 4 D. & L. 648.

(*q*) Anon. 12 Mod. 525.

PART III. CH. V. S. 1.

form, as it is compulsory on the court to make it a rule of court on the affidavit being produced.

In term or vacation.

It may be made a rule of court in vacation as well as in term time, for the wording of the statute is construed with reference to the ordinary practice of the courts. On production of the affidavit and submission, a judge in vacation will grant his fiat for a rule. This, with a motion paper signed by counsel must be taken to one of the Masters of the court, who will draw up the rule (*r*).

Dating rule.

Whether the submission be made a rule by the common law authority of the court or under the statute of William, the rule, if delivered out in vacation, must be dated on the day of the month and week on which it is delivered out, but should be entitled as of the term immediately preceding the vacation (*s*). The liberty of drawing up a rule in vacation is very convenient, for when a cause has been the subject of the reference judgment may often be entered and execution issued in vacation for the amount awarded (*t*); and even where that remedy is not applicable, time is gained for making the demand and serving the rule of court during the vacation, so as to enable the party to make application for an attachment, or execution under the statute of Victoria, on the first day of the next term (*u*).

Enlargement of time part of rule.

If the time for making the award have been enlarged by the arbitrator or by the parties, and the award have been made after the original period has expired, the enlargements, verified by affidavit, should in general be made part of the rule of court with the submission, (as the enlargement becomes as it were part of the original submission); in order, it is said, that the court may see on the face of the award that it has power to deal with the award; since if the enlargements be not made part of the rule, the award will not appear to have been made

(*r*) Milstead v. Craufield, 9 Dowl. 124; Taylor, In re, 3 B. & A. 217; 2 Archb. Pr. 1256, 7th Ed.; R. v. Price, 2 C. & M. 212; Ross v. Ross, 16 L. J., Q. B. 138. See the Appendix of Forms for the form of the rule.

(*s*) Reg. Gen. H. T. 1 Vict. 3; Badman v. Pugh, 5 M. & G. 381.

(*t*) Cremer v. Churt, 15 M. & W. 310.

(*u*) Taylor, In re, 5 B. & A. 217.

under the submission, as it has not been made within the time limited by the submission (*x*).

Also appointment of umpire.

For the same reason, in the case of an umpirage, the appointment of the umpire should be made part of the rule (*y*).

It is not, however, absolutely essential to the enforcing the award in all cases, that the enlargements be thus made part of the rule; for when the submission has alone been made a rule, an attachment will be granted if the affidavits in support of the motion for the attachment properly verify the enlargements (*z*).

Not necessary on motion to set aside award.

In very recent instances, the ordinary practice of making enlargements of time part of the rule, has been considered to be necessary only when the object is to enforce the award, and has been condemned as a bad practice when the making the submission a rule of court is with a view of moving to set aside the award (*a*).

Notwithstanding these decisions, it is the practice in the Queen's Bench rule office, in the case of an award made by an umpire, to require that the appointment of the umpire be made part of the rule, even although the object be to set aside the award (*b*). We shall see the court have recently decided that this is not necessary when the reference is under the Lands Clauses Consolidation Act (*c*).

All made part of one rule.

The enlargement of time by the arbitrator, the appointment of the umpire, and the original submission, may be made a rule of court by one rule (*d*).

If the enlargements be by judges' orders, they, like enlargements by the parties or the arbitrator, should be made part of the rule of court. The old practice seems to have

(*x*) Smith & Blake, In re, 8 Dowl. 130; Evans v. Thompson, 5 East, 188.

(*y*) Smith & Reeves, In re, 5 Dowl. 513.

(*z*) See P. 3, ch. 6, s. 3, d. 1.

(*a*) Welsh, In re, 1 Dowl. N. S. 331; Bottomley v. Buckley, 4 D. & L. 157. See post, p. 556, as to making appointment of umpire under the Lands Clauses Consolidation Act a rule of court.

(*b*) Ex relatione of the officers of the Rule Office of the Court of Queen's Bench.

(*c*) See Bradshaw and East and West India Docks and Birmingham Junction Railway Comp. Q. B. argued E. T. 1848. See s. 3 of this chapter, p. 556.

(*d*) Smith & Reeves, In re, 5 Dowl. 513.

PART III. CH. V. S. 1.

been for the clerk of the rules to draw up separate rules for each order of a judge to enlarge the time; in a late case, however, where there were several enlargements by judges' orders, the court allowed them to be made a rule of court by a single rule (*e*).

Copy of lost submission made rule.

If the submission be lost, the court will, on a verified copy of it, make it a rule of court (*f*).

Duplicate.

Where an arbitrator refused to deliver up an original order of reference (a judge's order) without payment of an exorbitant fee, the court allowed a duplicate of the order to be made a rule of court (*g*). But when the party alleging only that he could not obtain the original submission, because it was in the hands of the opposite party, moved to make a copy of the submission a rule of court, the court refused the application, but granted a rule calling upon the opposite party to show cause why he should not produce the original submission, in order that it might be made a rule of court (*h*). On such a motion, where it appeared that two parts of a deed of submission had been executed, but that the arbitrator had indorsed the enlargement of the time for making the award on one part only, the court compelled the party in whose possession that part was, to make it a rule of court, but at the expense of the party making the application (*i*).

Production of submission compelled.

Submission belongs to both parties.

In a recent case, it was laid down that the order of reference does not belong exclusively to either party, but that the party holding it holds it for the benefit of both parties, and is bound to produce it in order to its being made a rule of court; and where the defendants in whose possession it was, and in whose favor the award was made, delayed making the order of reference a rule of court till it was too late to move within the time ordinarily allowed for setting aside awards; the court ordered the defendants either to make

(*e*) Tribe & Upperton, In re, 3 A. & E. 295.

(*f*) Short v. Frank, 3 Jur. 341.

(*g*) Thomas v. Philby, 2 Dowl. 145.

(*h*) Ld. Borton v. Mesham, 8 Dowl. 867. See Todd, ex parte, W. W. & D. 577.

(*i*) Smith & Blake, In re, 8 Dowl. 131.

the order of reference a rule of court, or to file it with one of the Masters, so as to enable the plaintiff to make it a rule of court, and allowed the plaintiff to move to set the award aside in a subsequent term "nunc pro tunc" (*k*). A somewhat similar course was pursued still more lately (*l*).

On refusal to produce, copy made rule.

In another case, where the party interested in opposing the motion refused to produce the agreement of reference for the purpose of its being made a rule, the court permitted a copy to be made a rule of court, and granted, thereupon, a rule nisi for setting the award aside (*m*). So where the party in possession of the agreement of reference had promised, but failed to make it a rule of court, the same course was followed, though Lord Denman, C. J., expressed a doubt whether the statute (meaning, it is apprehended, the Lands Clauses Consolidation Act) embraced the making a copy of the submission a rule of court (*n*).

SECTION II.

MAKING THE SUBMISSION A RULE OF CHANCERY.

Practice making submission under statute rule of equity.

On notice of motion.

When it is intended to make a submission under the statute 9 & 10 W. III. c. 15, an order of a court of equity, a notice of motion should be given; if then the opposite party do not appear, the court will make the order upon the production of an affidavit of the service of the notice of motion, and an affidavit of the due execution of the submission.

(*k*) Bottomley v. Buckley, 4 D. & L. 157.

(*l*) Midland Railway Company & Heming, In re, 4 D. & L. 788. See P. 3, ch. 9, s. 2, d. 1, as to the same case.

(*m*) Plews v. Middleton, 6 Q. B. 845.

(*n*) Midland Railway Company & Heming, In re, 11 Jur. 904.

PART III. CH. V. S. 2.

On ex parte application.

If, however, the submission give either party liberty to apply to the court without reference to the other, it is unnecessary to serve a notice of motion, and the order will be made on an ex parte application, supported by an affidavit of the due execution of the submission.

On consent.

When the opposite party consents, there need be no affidavit of service of notice of motion, or of the execution of the submission, but the order will be drawn up on the production of a consent brief.

Order of court.

The order is drawn up on the equity side of the Court of Chancery. It directs that the agreement to refer to arbitration be made an order of court, to be observed and performed by the parties thereto, according to the true meaning thereof (*a*).

Making award a rule.

When a party seeks to enforce the award, both the submission and award are sometimes made orders of Chancery by an ex parte application (*b*). But it would now seem, the motion to make the award an order of Chancery, is a special motion, and requires notice (*c*).

On one occasion, when the application was to make the award a rule of court, Sir J. Leach, V. C., said that it was wrong to ask that the *award* might be made a rule of court, and that the proper course under the statute was to make the *submission* a rule of court (*d*). Whether the application was to set aside or enforce the award in this case is not stated.

Filing submission and award.

Before the orders making the submission and award orders of the court can be passed by the Registrar, the submission and award must be filed in the Report Office, whence the parties can procure office copies (*e*).

(*a*) 2 Daniell's Chanc. Pract. by Headlam, 1756. See notes to Heming v. Swinnerton, 1 Coop. C. C. 386; 2 Smith Chanc. Pract. 437, 3rd Ed. See the Appendix of Forms for the form of the order.

(*b*) Harvey v. Shelton, 7 Beav. 455.

(*c*) Wilkinson v. Page, 1 Hare, 276. See last chapter, s. 3, d. 1, p. 537.

(*d*) Lewis v. Eley, May, 1823, cited in Heming v. Swinnerton, 1 Coop. C. C. 423, notes. See also Heming v. Swinnerton, 16 L. J. Ch. 287.

(*e*) 2 Daniell's Chanc. Pract. by Headlam, 1756.

The orders do not set out the submissions and awards, but merely describe them generally. But a note of the filing is made on the margin of the orders, by which reference can be made to them in the Report Office (*f*).

Submission and award not set out in the orders.

By the general rules and orders for regulating the practice of the Court of Bankruptcy, G. O. xxxii., Jan. 12, 1832, it was ordered, "that all agreements of reference to be made rules of the Court of Bankruptcy, shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by the Court of Review" (*g*).

Making submission in bankruptcy a rule of the Court of Bankruptcy.

Since the recent statute, 10 & 11 Vict. c. 102 has abolished the Court of Review, and transferred all its jurisdiction and authority to such one of the Vice-Chancellors as the Lord Chancellor shall direct, it is presumed application must now be made to such Vice-Chancellor for an order to make the submission a rule of the Court of Bankruptcy.

SECTION III.

MAKING A SUBMISSION UNDER THE LANDS CLAUSES CONSOLIDATION ACT A RULE OF COURT.

By the Lands Clauses Consolidation Act, 1845, where the parties do not agree on a single arbitrator, each party is to appoint one, and such appointment "shall be deemed a sub-

Making submission under the Lands

(*f*) Ex relatione of an officer of the Registrar's Office. See Appendix of Forms for the forms of the orders. See 2 Smith's Chanc. Pract. 437, 438, 3rd Ed. for the old practice.

(*g*) 1 Deacon & Chitty, xxix. See P. 1, ch. 3, s. 7, d. 2, as to submissions in bankruptcy; P. 1, ch. 2, s. 2, d. 1, submission by assignees.

mission to arbitration on the part of the party by whom the same shall be made" [s. 25]; and "the submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties" [s. 36.]

Clauses Act a rule of court.

Entitling affidavits in Chancery.

When the parties proceed in Chancery, the affidavits verifying the submission, or the appointments of the arbitrators, and all other proceedings, should be entitled, "In the matter of the arbitration between A. B. and C. B., and in the matter of the" act or acts which warrant the application to the court (*a*).

Whether appointments of both arbitrators must be made a rule.

The question has been raised in several of the courts whether, in order to make the submission to arbitration a rule of court, it is necessary that the appointments of both arbitrators should be produced, or whether it is sufficient for the party to produce the appointment made to the arbitrator appointed by himself.

In Trinity term, 1847, with a view to set aside an award under the act, the submission was made a rule of court in the Queen's Bench, on the one appointment only being produced. That appointment recited the fact of the other appointment. On moving to set the award aside, the counsel mentioned that the rule had been drawn up on the one appointment only. The court nevertheless granted the rule nisi, leaving the other party to raise the objection if he thought fit. The point, however, was not taken on showing cause, and the award was ultimately set aside (*b*).

Practice in the Q. B. to require both appointments to be produced.

Since that time, however, the practice of Queen's Bench has become more settled, and the officers of the court will not now draw up the rule without both appointments being produced, and verified by affidavits. The same practice, it is understood, prevails in the offices of the other courts of law (*c*). It is to be observed that there has been no decision of the courts of law as to the necessity of producing both the appointments.

(*a*) Re Law, 4 Beav. 509. See forms in the Appendix of Forms.

(*b*) Ward v. Great North of England Railway Comp. T. T. 1847, Bail Court.

(*c*) Ex Relatione of the officers of the Queen's Bench Rule Office.

In equity, however, the matter has undergone much discussion.

Making submission under Lands Clauses Act rule of Chancery.

With a view to proceedings to set aside the award of an umpire, made on the 29th of November, 1847, under the provisions of the Lands Clauses Consolidation Act, 1845, fixing the amount of compensation to be paid by a Railway company for land taken by them for the purposes of their act, the company obtained an order (upon a motion of course,) from V. C. Knight Bruce, for making the submission a rule of Chancery, under s. 36 of the first mentioned statute.

Order drawn up on one appointment only under special circumstances.

The registrar refused to draw up the order unless the original appointment of both the arbitrators, by the company and the landowner respectively, were produced to him. The company produced and verified the appointment by themselves, but were not able to obtain the original or a copy of the appointment by the landowner. It appeared that the original appointment by the landowner was in the hands of the landowner's arbitrator. The Vice-Chancellor refused to order the latter, or the landowner, to produce either the original or a copy: but it appearing that repeated applications had been made to both of them to produce the appointment or a copy without success, ultimately directed the submission to be made a rule of court on the production of the appointment of the company's arbitrator, the appointment of the umpire, (which recited the fact of the appointment of the landowner's arbitrator, and was signed by him,) the award, and the affidavits which had been filed, in which the fact of the appointment was distinctly sworn to (*d*).

Advisable to make the appointments of the arbitrators in duplicate.

The cases already cited show the great practical difficulty which either party may often have in obtaining possession of the appointment of his opponent's arbitrator, when he wishes to make the submission a rule of court, and the delay, expense, and inconvenience to which this difficulty

(*d*) Hawley v. North Staffordshire Railway Company, H. T. 1848, V. C. K. B. See p. 550, as to making copy of submission a rule of a court of law. See P. 1, ch. 3, s. 7, d. 7, p. 93, as to submissions under the Lands Clauses Act. See also Appendix of Forms for the order in this case.

may subject him. A method, it is suggested, may be found to remedy this difficulty, and to enable either party at pleasure to make the submission a rule of court.

If each party took the precaution at the time of the reference of requesting the other party to make the appointment of his arbitrator in duplicate, and if they were mutually to furnish each other with one of the duplicate parts, (and not a mere copy,) there seems no reason why, on producing the appointment of his own arbitrator and the duplicate original appointment of his opponent's arbitrator, and properly verifying both of them, the submission might not be made a rule of court. It is believed that the officers of the courts would not hesitate to draw up the rule on such documents.

Another advantage of this course would be to enable each party to see what his opponent called upon his arbitrator to do, so that if there were any material difference between his own and his opponent's appointment the error might be rectified before any steps were taken in the reference.

Appointment of umpire need not be made rule of court.

On a motion in the Queen's Bench to set aside an award made by an umpire under "The Lands Clauses Consolidation Act," the party showing cause objected that the appointment of the umpire had not been made a rule of court, but the Court of Queen's Bench overruled the objection, holding that step unnecessary (*e*).

(*e*) Bradshaw v. East and West India Docks and Birmingham Junction Railway Comp., Q. B., E. T. 1848.

CHAPTER VI.

ENFORCING THE AWARD BY ATTACHMENT.

THE summary method of enforcing performance of an award by attachment is set forth in this chapter.

Contents of the sixth chapter.

The first section examines to what cases this mode of proceeding is applicable, and when applicable, under what circumstances the courts in the exercise of their discretion will grant or refuse it.

The second points out the steps necessary to be taken by the party seeking this remedy; namely, making the submission a rule of court, demanding performance of the party charged to obey, and serving him with the proper documents, in order to bring him into contempt, and so amenable to the process of the court.

In the third section, the course of the motion for the attachment is considered, and the law is investigated respecting the affidavits to ground the motion, the rule nisi, the defence that may be set up in answer, the result of the application, and the proceedings consequent on the party in contempt being arrested under the attachment.

SECTION I.

IN WHAT CASES AN ATTACHMENT WILL BE GRANTED.

PART III. CH. VI. S. 1.

When submission a rule not performing award contempt of court.

I. *Only when submission a rule of court.*]—When the submission has been made a rule of court, the party who refuses or neglects to perform what the award orders is considered as disobedient to the rule of court, as much as if the award were part of the rule, and is consequently guilty of a contempt of that court by which the rule has been made. The process, therefore, by which the courts punish contempts, called an attachment, will be issued against him to compel his obedience to the directions of the arbitrator, under the penalty, in ordinary cases, of imprisonment until he comply (*a*).

Attachment at common law.

Before the time of Charles II., though an attachment would issue when the submission was by judge's order or rule of court to compel the party to submit to the arbitrator, or to punish him for a breach of the submission, it was not considered by the courts of common law that obedience to the award, when made, could be enforced by the same process. But in the reign of that monarch, though the courts at first hesitated about granting applications for attachments for non-performance of the award, yet they ultimately allowed them; and the granting the remedy by attachment was in William the Third's reign spoken of as the settled practice of the courts (*b*).

Attachment in equity.

In the courts of equity no such difficulty seems to have been felt about granting attachments for non-performance of

(*a*) Bac. Ab. Arb. H.; Anon. 1 Salk. 71.

(*b*) Clemenhere v. Tresilian, 2 Keb. 645; Stiles v Triste, 1 Keb. 130, 138; S. C. Sid. 54; S. C., T. Raym. 35; Darbyshire v. Cannon, 1 Mod. 21; Holt v. Berry, 3 Keb. 844; Anon. 1 Salk. 71; Forster v. Brunetti, 1 Salk. 83; Hall v. Mister, 1 Salk. 84; Anon. 12 Mod. 257; Veale v. Warner, 1 Saund. 327, c.

the award, when the submission was by an order in equity (*c*).

Attachment under the statute of William III.

So convenient a remedy was it found that the statute 9 & 10 W. III. c. 15, was passed to extend to all submissions respecting matters of a civil nature which should contain consent clauses for making them rules of court, the same compulsory method of enforcement which had previously been confined to submissions concerning matters respecting which actions or suits had been commenced (*d*).

Attachment lies when submission can be made a rule.

Hence at the present day, as a general rule, whenever the submission can be made a rule of court, the award is capable of enforcement by attachment; and the converse holds also, so that whenever the submission cannot be made a rule of court, as where it is merely verbal (*e*), or where, if in writing by agreement out of court, it contains no clause for making it a rule of court, or an insufficient clause (*f*), no attachment can be granted, even though a cause be the subject matter referred (*g*), for the court has no jurisdiction where there is no rule of court (*h*).

No attachment when cause abates by death.

If by matter subsequent the submission, after having been made a rule, ceases to be valid as a rule of court, the like result will follow. Therefore where a cause before issue joined was referred by a judge's order, and the arbitrator found that the plaintiff had no cause of action, and the order of reference was then made a rule of court, and after this the defendant died, and the costs which were to abide the event were taxed; the court held that the suit abated by the death of the defendant, that they could not enforce a rule made in the cause which was gone, and that therefore his administratrix could not have an attachment against the plaintiff for non-payment of the costs, but must bring an action to recover them (*i*); and Parke, J., remarked, that in

(*c*) Bac. Ab. Arb. H.; Hide v. Petit, 1 Cas. in Chanc. 91, 185.

(*d*) See submission under the 9 & 10 W. III. c. 15, p. 57.

(*e*) Ansell v Evans, 7 T. R. 1; — v. Mills, 17 Ves. 419.

(*f*) See submission under 9 & 10 W. III. c. 15, ante, p. 57.

(*g*) Clarke v. Baker, 1 H. & W. 215.

(*h*) Owen v. Hurd, 2 T. R. 643.

(*i*) Maffey v. Godwyn, 1 N. & M. 101; S. C., R. v. Maffey, 1 Dowl. 538.

PART III. CH. VI. S. 1.

the case of *Rogers* v. *Stanton* (*k*), relied on in argument, the point concerning the abatement of the suit was not fully considered. In that case, under a reference by a judge's order, to which a stranger to the cause had become a party, the executor of the defendant, who had died after the award was made, was held entitled to an attachment against the stranger for the amount, which the arbitrator directed the latter to pay to the defendant (*l*).

Attachment on reference of indictment.

On proceedings of a criminal character an attachment equally lies. Thus, if an indictment for a nuisance has been referred and a verdict taken subject to the reference, the defendant may be compelled by attachment to abate the nuisance as directed by the award (*m*).

Attachment lies for party or representative.

II. *For whom and for what an attachment will be granted.*]—An attachment will be granted on the application of a party to the submission, or if he be dead, of his personal representative, if the rule of court be not avoided by the death (*n*).

Not for a stranger.

A stranger to the submission cannot have an attachment to enforce payment of a sum, which the award directs to be paid to him, though the direction itself, under the circumstances, be perfectly valid (*o*).

Whether for the arbitrator.

On one occasion it was said an arbitrator might have an attachment to enforce payment of the costs of the award (*p*), but the soundness of that opinion was denied in a subsequent case (*q*). There does not seem to be any instance of such an application having been granted.

Attachment lies if award not performed.

Whether the award order a party to pay money or to do any collateral act, an attachment lies if he fail to comply, since disobedience in either case is equally a contempt (*r*).

For costs as well as damages.

The costs of the reference and award (and when there is

(*k*) 7 Taunt. 575.
(*l*) Rogers v. Stanton, 7 Taunt. 575.
(*m*) R. v. Gore, 8 Dowl. 102.
(*n*) R. v. Maffey, 1 Dowl. 538; Rogers v. Stanton, 7 Taunt. 575.
(*o*) Skeete, In re, 7 Dowl. 618.
(*p*) Hicks v. Richardson, 1 B. & P. 93.
(*q*) Burroughes v. Clarke, 1 Dowl. 48.
(*r*) Doddington v. Bailward, 7 Dowl. 640.

a cause referred the costs of the cause also, even though no separate damages be awarded) may be taxed pursuant to the award on the rule of court embodying the submission, and if not paid may be recovered, together with the amount specified in the award, as the debt or damages (*s*).

For money paid on taking up award.

Where the award orders each party to pay a moiety of the costs of the award, the party who in order to get the award from the arbitrator pays the whole, is entitled to an attachment against his opponent for the moiety for which under the award he is liable (*t*).

Not for interest on sum awarded.

No attachment can be granted to recover interest on a sum of money awarded to be paid by a certain day, though interest from that time may be recovered by action (*u*).

III. *Who not liable to be attached.*]—No attachment lies against a peer (*x*), or a member of the House of Commons (*y*), for disobedience to an award.

No attachment against peers.

Members of the House of Commons.

It will not issue against the executor of a party who dies after the award is made without having performed it, for the contempt is personal, and the liability to punishment for a contempt dies with the person (*z*). So, though there be a clause preventing the death of a party revoking the arbitrator's authority, and the party die pending the reference, his executors cannot be compelled by attachment (though they may by action) to perform the award on the part of their testator (*a*).

Whether attachment against executors.

(*s*) Grundy v. Wilson, 7 Taunt. 699; Little v. Newton, 1 M. & G. 976; Taylor v. Shuttleworth, 2 M. & G. 55; S. C. 6 Bing. N. C. 277; Thorp v. Cole, 4 Dowl. 457.

(*t*) Hicks v. Richardson, 1 B. & P. 93; Burroughes v. Clarke, 1 Dowl. 48; Stokes v. Lewis, 2 Smith, 12.

(*u*) Churcher v. Stringer, 1 Dowl. 332; S. C. 2 B. & Ad. 777.

(*x*) Walker v. Earl of Grosvenor, 7 T. R. 171.

(*y*) Catmur v. Knatchbull, 7 T. R. 448.

(*z*) Webster v. Bishop, Prec. in Chanc. 223; S. C. 2 Vern. 444; Newton v. Walker, Willes, 315; Doe d. Pain v. Grundy, 1 B. & C. 284; Houlditch v. Houlditch, 1 Swanst. 58.

(*a*) Tyler v. Jones, 3 B. & C. 144; Lewin v. Holbrook, 11 M. & W. 110.

As by submitting to a reference without guarding against being personally responsible, executors, and trustees, and assignees of bankrupts and insolvents are taken impliedly to admit that they have sufficient funds or assets to answer the award, they are liable to an attachment if the arbitrator order them to pay, and will not be allowed to allege in excuse for non-performance that they have no assets (*b*). An executor personally liable for the costs of an action referred, may be compelled to pay them by the like process (*c*). If the arbitrator order an executor to pay out of the assets which may be in his hands, or which may come to him, an attachment will not issue if he have no assets in hand, but will be subsequently granted on proof of assets having come in (*d*).

Husband and wife.

Where a woman whom the arbitrator directed to deliver up two notes, and to pay a sum of money, failed to comply, and afterwards married, and her husband refused to pay the amount, it was doubted whether the court could grant an attachment against both or either of them (*e*).

Public officer.

If a public company are by statute authorized to sue and be sued in the name of their treasurer, but he is not to be liable in person or goods by reason of being a defendant; the reference of actions in which he is so made the nominal plaintiff or defendant, does not impose upon him any personal liability to an attachment for not paying the amount awarded against him. A mandamus against the treasurer and directors is the only remedy (*f*).

Corporation.

An attachment does not lie against a corporation for non-performance of an award (*g*). If any process of contempt can issue when a corporation is in default, it must be against the individual members of the corporation (*h*).

(*b*) Wansborough & Dyer, In re, 2 Chitt. 40; Worthington v. Barlow, 7 T. R. 453; Robson v. ——, 2 Rose, 50. See P. 1, ch. 2, s. 2, dd. 4, 5, 6, p. 36.

(*c*) Spivy v. Webster, 2 Dowl. 46.

(*d*) Joseph & Webster, In re, 1 Russ. & M. 496.

(*e*) Anon. 1 Cromp. 265, 3rd Ed., cited 2 Tidd. Pract. 835, 9th Ed.; Bac. Ab. Arb. H.

(*f*) Corpe v. Glyn, 3 B. & Ad. 801.

(*g*) Guildford v. Mills, 2 Keb. 1; Anon. T. Raym. 152.

(*h*) London v. Lynn, 1 H. Bl. 206.

Though the party be beyond the jurisdiction of the court at the time of his neglect to perform the award, and remain out of the jurisdiction, the court will nevertheless issue the process, as an attachment to enforce an award is not in the nature of criminal, but merely civil process, and the court will not inquire whether it can be made available (*i*). Party beyond the jurisdiction.

IV. *On what awards attachment refused.*]—The award itself, though valid, may be so framed as to preclude a remedy by attachment. No attachment, award not ordering payment.

If the award find a certain sum to be due, but do not order the party indebted to pay the sum, no attachment can be granted; for there is no contempt of court where there is no express order to pay the amount awarded (*k*), but the remedy by action on the award remains. An unauthorized direction of a verdict to be entered for a certain sum, does not amount to an order to pay that sum, so as to warrant an attachment (*l*).

If an award direct that A. or B. shall do an act, it seems doubtful whether an attachment can issue against either (*m*). Directing A or B to do an act.

Though the remedy by action on the award be of right, it is perfectly discretionary with the court whether they will grant an attachment or not (*n*). Discretionary to grant attachment.

It is reported as having been decided, that when an award appears unreasonable, the court will not grant an attachment, but leave the party to his action on the award (*o*). Unreasonable award.

In one instance the Court of Common Pleas refused to grant an attachment for enforcing a parol award (*p*); but on Parol award.

(*i*) Hopcraft v. Fermor, 8 Moore, 424; S. C. 1 Bing. 378.

(*k*) Seaward v. Howey, 7 Dowl. 318; Edgell v. Dallimore, 3 Bing. 634; S. C. 11 Moore, 541; Scott v. Williams, 5 Tyrw. 506; S. C. 3 Dowl. 508; S. C. sub. non. Hopkins v. Davies, 1 C. M. & R. 846.

(*l*) Donlan v. Brett, 2 A. & E. 344.

(*m*) Lawrence v. Hodgson, 1 Y. & J. 16.

(*n*) Stock v. De Smith, Cas. temp. Hardw. 106.

(*o*) Wilmot v. Allen, cited in Stock v. De Smith, Cas. temp. Hardw. 106.

(*p*) Dickman v. Hutherd, Pract. Reg. C. B. 44; S. C. Vin. Ab. Arb. Suppl. H. a. 1.

a subsequent occasion they considered the objection to the award being by parol to be futile, and made the rule for the attachment absolute (*q*). There is also another recorded instance of an attachment issuing under similar circumstances (*r*).

Mistake in award.

Where the arbitrator made a mistake in his award in the christian name of the defendant, the court refused to enforce it against the defendant by attachment (*s*). On a reference by a judge's order, where the award set forth a supposed submission by order of Nisi Prius, it was said in one case the court would not enforce the award by attachment (*t*).

Validity of award doubtful.

If there be any reasonable doubt as to whether the award be sufficient in law, or if the question turn on a disputed matter of fact, and the affidavits be contradictory, the courts will refuse the application and leave the party to his action; for if an attachment issue, the award must be obeyed, and there is no means of appealing against the decision of the court, and solemnly trying the validity of the award (*u*). Thus where the parties agreed to abide by the award made by the "two arbitrators and their umpire," and the award was made by the two arbitrators only, the objection being taken that all three ought to have executed it, the court considered the point too doubtful to grant an attachment (*x*). The power of the Master to tax the costs of a cause and reference separately for each of the two joint defendants in the cause referred, is too questionable to warrant the granting an attachment against the plaintiff, at the instance of one of the defendants, for non-payment of his share of the costs awarded to the defendants (*y*).

(*q*) Cookson v. Monkhouse, Pract. Reg. C. B. 44.

(*r*) Rawling v. Wood, Barnes, 54.

(*s*) Lees v. Hartley, 8 Dowl. 883.

(*t*) Christie v. Hamlet, 2 M. & P. 316; S. C. 5 Bing. 195.

(*u*) Dickenson v. Allsop, 13 M. & W. 722; S. C. 2 D. & L. 657; Cargey v. Aitchison, 2 D. & R. 222; Thornton v. Hornby, 1 M. & Sc. 48; S. C. 8 Bing. 13; Stalworth v. Inns, 2 D. & L. 428; Hales v. Taylor, 1 Stra. 695; Spooner v. Payne, 11 Jur. 242.

(*x*) Heatherington v. Robinson, 7 Dowl. 192.

(*y*) Dickins v. Jarvis, 5 B. & C. 528.

After a long delay, as for four years, from the time when the award was made, the court will require an affidavit explaining the delay before an attachment be allowed (*z*).

Delay in applying to the court.

v. *No proceeding by attachment and action at the same time.*]—As it is considered vexatious to bring two separate proceedings for the same ground of complaint, the courts will not permit a party to enforce the award by action and attachment at the same time (*a*).

No attachment together with action on award.

Formerly a different rule prevailed. Though judgment had been first obtained in an action on the arbitration bond, the court, in one instance, granted an attachment, on the ground that an attachment might possibly be a more quick and effectual process than suing out execution on the judgment (*b*). And in other cases, where attachments had been granted, and the party taken into custody, the courts refused to stay proceedings in actions on the arbitration bonds, subsequently commenced, alleging that the plaintiff had had no satisfaction upon the attachment (*c*).

Old rule, attachment after action.

In a cross action by the defendant, though the plaintiff had given notice of set-off of the sum awarded in his favor, the court nevertheless made absolute the plaintiff's rule for an attachment, but ordered it to stay a month in the officer's hands (*d*). Where a question as to the regularity of the judgment for the plaintiff, in an action on the award, was referred to the Master, an attachment was granted pending the inquiry, but was subsequently stayed on the judgment being reported regular (*e*).

In more modern times, in some instances, the courts have refused to grant an attachment while an action is pend-

Electing by which mode to proceed.

(*z*) Storey v. Garry, 8 Dowl. 299.

(*a*) Stock v. De Smith, Cas. temp. Hardw. 106.

(*b*) Clarke v. Elwick 10 Mod. 332.

(*c*) Anon. 1 Salk. 73; Paterson v. Gross, 2 Barnard. 227.

(*d*) Harrison v. Oliver, Barnes, 56.

(*e*) Richardson v. Chancey, cited in Stock v. De Smith, Cas. temp. Hardw. 106; S. C. 1 Barnard. 386.

ing (*f*), even where the plaintiff was willing to waive the action, on the ground that the party had made his election as to which of the two remedies he would adopt, and must abide by it (*g*).

Attachment on discontinuing action.

But in others the attachment has been allowed to issue on the plaintiff's undertaking to discontinue his action (*h*). The more regular course is to discontinue the action, and pay the costs of it first, and after that to apply to the court for the process of contempt (*i*). The fact of an action having been commenced is no bar to the motion, provided it be not pending when the demand of performance is made, and it lies on the party resisting the application to show that it is pending (*k*). Filing an affidavit of debt in the Court of Bankruptcy in respect of the amount awarded, with a view to make the defendant a bankrupt, (which view the defendant has defeated by entering into a bond with sureties, under the statute 1 & 2 Vict. c. 110,) will not preclude a motion for an attachment, no action having been commenced (*l*).

Filing affidavit of debt.

Action after attachment.

If an action be brought on the award after the defendant has been taken into custody on an attachment, the plaintiff will be put to his election, and if he prefer proceeding with the action, the attachment will be set aside, and the defendant discharged out of custody on his entering into a bond with sureties, to the plaintiff, in the nature of a bail-bond (*m*).

In a recent case, Wilde, C. J., stated his opinion that where a party, who having wilfully refused to perform an award, which he had the means of obeying if he chose, had been taken on an attachment, and sentenced to a term of im-

(*f*) Stock v. De Smith, Cas. temp. Hardw. 106.

(*g*) Badley v. Loveday, 1 B. & P. 81.

(*h*) Paull v. Paull, 2 Dowl. 340; S. C. 2 C. & M. 235; Anon. Andr. 299.

(*i*) Paull v. Paull, 2 Dowl. 340.

(*k*) Higgins v. Willes, 3 M. & R. 382.

(*l*) Mendell v. Tyrrell, 1 Dowl. N. S. 453.

(*m*) Earl of Lonsdale v. Whinnay, 3 Dowl. 263.

prisonment for the contempt; he was not, after suffering the punishment, entitled to his discharge, or relieved thereby from an action on the award (*n*).

SECTION II.

STEPS NECESSARY TO BRING THE PARTY INTO CONTEMPT.

Making submission a rule of court.

1. *Demanding performance of the award.*]—The first step to be taken with a view to proceeding by attachment, is to make the submission a rule of court. For until there exists a rule of court to be obeyed, non-performance of the award cannot be a contempt of court. The rule has no relation back for the purpose of rendering a party liable to this summary process (*a*).

Demand of performance necessary.

The party or parties entitled under the award must then make a demand upon the party or parties liable under it to obey the directions of the arbitrator, whether they be for the payment of money or the performance of any other act; and a demand must be made, although the time and place for doing the act be specified in the award, and there has been a failure in the performance (*b*).

Not valid pending motion to set aside award.

A demand to comply with the award, so as to bring the party into contempt, cannot be made while a rule for setting aside the award is pending; for while the validity of the award is under the consideration of the court on a motion to

(*n*) R. v. Hemsworth, 3 C. B, 745.

(*a*) Mayor of Bath v. Pinch, 4 Scott, 299; Chilton v. Ellis, 2 Dowl. 338; Hilton v. Hopwood, 1 Marsh. 66. See P. 3, ch. 5, s. 1, p. 544, making submission a rule of court.

(*b*) Brandon v. Brandon, 1 B. & P. 394; Dodington v. Hudson, 1 Bing. 410.

set it aside, non performance of its directions is no contempt (*c*).

Demand by all parties.

The demand must be by all the parties entitled; for where the arbitrator ordered the defendant to deliver a bond to the three plaintiffs, and one only demanded it, the court refused an attachment, holding that the demand ought to have been made by all three, or under a power of attorney executed by them all, so that the defendant might have known that it was by their joint authority (*d*).

Demand by party or agent with power of attorney.

The demand may be made either by the party himself, or by a third party, authorized by power of attorney (*e*). A demand by the clerk of the party entitled is not enough (*f*). In one instance, a demand by an agent under a written authority, indorsed on the award, and unstamped, was, after hesitation, considered sufficient to warrant a rule nisi for an attachment (*g*); but at the present day the courts would assuredly refuse their process, unless the agent who demanded a sum of money awarded, acted under a power of attorney from his principal (*h*).

Agent demanding execution of a deed.

A distinction is taken between demanding money awarded, and calling upon the party to perform other acts directed to be done. Thus if an award direct the execution of certain deeds, the agent who tenders the deeds for execution need not be empowered by deed or power of attorney to make the demand (*i*).

Demand by attorney.

Whether a valid demand of the damages or of the costs awarded in a cause referred can be made by the attorney or his agent, without a power of attorney, does not seem to have been decided with respect to awards, though it is apprehended that it many cases it would be sufficient; for it

(*c*) Dalling v. Matchett, Willes, 215; Morris v. Reynolds, 1 Salk. 73.

(*d*) Sykes v. Haigh, 4 Dowl. 114.

(*e*) Tidd Pr. 836, 9th Ed.; Mason v. Whitehouse, 6 Dowl. 602.

(*f*) Hartley v. Barlow, 1 Chitt. 229.

(*g*) Langman v. Holmes, 2 W. Bl. 990.

(*h*) Laugher v. Laugher, 1 Dowl. 284; S. C. 1 C. & J. 398.

(*i*) Tebbutt v. Ambler, 2 Dowl. N. S. 677; Kenyon v. Grayson, 2 Smith, 61; Lodge v. Porthouse, Lofft. 388.

is clear that when costs are payable to a party by a rule of court, his attorney may often demand payment by virtue of his character (*k*).

If the attorney have a lien on the amount awarded, and give the party notice of his lien at the time of the demand, and before the money has been paid, an attachment will, it seems, issue if payment be refused (*l*).

Party not attending to receive sum awarded.

Though the award direct payment of money at a particular time and place, and the party to whom it is awarded do not attend to receive it, a proper demand any time subsequent will be sufficient for an attachment, as the duty to pay the sum awarded is a continuing liability, unless indeed the award expressly order that it is to be payable on the particular day, and not after (*m*).

Performing condition precedent.

There is no contempt if any condition precedent to the attaching of the duty remain unperformed.

Hence, when a defendant is ordered to execute a conveyance, if the plaintiff be bound to prepare and tender the conveyance, the refusal of the defendant to convey the land is no ground for attachment, unless the proper deeds are tendered to him for execution (*n*).

Demand only of what is well awarded.

If the arbitrator award on a matter not within his authority, the demand should be only in respect of what is well awarded, or it may be held bad as to the whole. Thus, where an arbitrator, without authority, awarded on the costs of the reference, and the demand was of one sum, including the costs, the rule for an attachment was discharged (*o*). Where there had been a proper demand for costs awarded, but the amount was subsequently reduced pursuant to a judge's order, a fresh demand of the reduced amount was

(*k*) Inman v. Hill, 4 M. & W. 7; Dennett v. Pass, 1 Bing. N. C. 638; Fortescue, Ex parte, 2 Dowl. 448; Mason v. Whitehouse, 6 Dowl. 602, contrâ; S. C. 4 Bing. N. C. 692, acc.; 2 Archb. Pract. 1257, 7th Ed.

(*l*) Ormerod v. Tate, 1 East, 462.

(*m*) Craike, In re, 7 Dowl. 603.

(*n*) Standley v. Hemmington, 6 Taunt. 561; Doe d. Clarke v. Stillwell, 8 A. & E. 645. See Performance, ante, Ch. 2 of this part, p. 477.

(*o*) Strutt v. Rogers, 7 Taunt. 214.

held necessary to ground an attachment (*p*). But if the award be of two distinct sums, one within the submission, and the other not, and a demand be made of both, a clear refusal to pay anything will be a contempt (*q*). Generally speaking, the demand of performance of an act beyond the power of the arbitrator to order, will not vitiate the demand as to other matters properly awarded (*r*).

Demand of precise thing awarded.

The precise thing awarded should be demanded. Where on an award to pay money, and to deliver a wine-warrant for a certain hogshead of wine lying in the docks, a demand of the money and of the hogshead of wine was made; the court let an attachment issue for all excepting the wine, and refused it for that, since a demand of the wine is not equivalent to demanding the wine-warrant, for the delivering the wine would impose upon the party the payment of the dock dues, which the delivery of the warrant would not (*s*).

Personal service of copy of award and rule.

II. *Service of the rule, award, and other documents.*]—In general, besides the demand, in order to ground an attachment, there must be personally served on the party sought to be charged, at the time of making the demand, a copy of the award, and of the rule of court, founded on the submission; for a party cannot be held to be in contempt until he be made acquainted with the rule of court, for the disobedience to which it is sought to put him in contempt. Leaving a copy of the rule at the party's office is insufficient, though the original be shown him (*t*). If there be a demand of costs which have been taxed, a copy of the Master's allocatur for them must also be given at the same time. And if an agent make the demand, there must be personally left with the party a copy of the power of attorney, or other authority under which the agent acts. The originals of all

Of the Master's allocatur.

Of the agent's power of attorney.

(*p*) Spivy v. Webster, 1 Dowl. 696.

(*q*) Poyner v. Hatton, 7 M. & W. 211.

(*r*) Smith & Reeves, In re, 5 Dowl. 513.

(*s*) Hemsworth v. Brian, 1 C. B. 131.

(*t*) Parker v. Burgess, 3 N. & M. 36.

these several instruments must be produced and shown at the time of serving the copies (*u*), even though the party do not require to see them (*x*).

Showing originals.

If the award have not been made within the period limited by the submission, but the time has been enlarged, notice of the enlargement, and that the award has been made within the extended time, must be given, in order to fix the party with a contempt (*y*).

Giving notice of enlargement of time.

Mere verbal notice is sufficient. Though the submission require that the enlargement be made in writing, it is not necessary to produce the original to the party, or to serve him with a copy. It is enough to bring the knowledge of the enlargement home to the party in any manner (*z*). A recital in the award that the arbitrator has enlarged the time to a certain day does not, it seems, amount to a good notice, although the award purports to be made within the extended period (*a*).

What sufficient notice.

Serving the original submission is not necessary, for it is the disobedience to the rule of court that is the foundation of the contempt (*b*).

Serving submission not requisite.

Tendering the copies of the proper documents to the party, and leaving them by him, is sufficient service, though he refuse to take them up (*c*).

What good service.

The originals need not be delivered into the hands of the party when produced to him. If they be shown so that he can read them it is sufficient (*d*).

(*u*) Tidd Pr. 837, 9th Ed.; Mayor of Bath v. Pinch, 4 Scott, 299; Boyes v. Hewetson, 2 Scott, 837; Gifford v. Gifford, Forr. 80; Doe d. Hickman v. Hickman, 1 Scott, N. R. 398; Bass v. Maitland, 8 Moore, 44, contrâ; Wadsworth, v. Marshall, 1 C. & M. 87; Anon. 12 Mod. 257; R. v. Tooley, 12 Mod. 312; Chanler v. Driver, 12 Mod. 317; King v. Packwood, 2 Dowl. 570; Laugher v. Laugher, 1 Dowl. 284; S. C. 1 C. & J. 398.

(*x*) Jackson v. Clarke, M'Lel. 72; S. C. 13 Price, 208; Reid v. Deer, 7 D. & R. 612; R. v. Sleman, 1 Dowl. 618.

(*y*) Hilton v. Hopwood, 1 Marsh. 66; Wohlenberg v. Lageman, 6 Taunt. 250.

(*z*) Doddington v. Bailward, 7 Dowl. 640.

(*a*) Davis v. Vass, 15 East, 96; Doddington v. Bailward, 7 Dowl. 640.

(*b*) Greenwood v. Dyer, 5 Dowl. 255.

(*c*) Ellis v. Giles, 5 Dowl. 255.

(*d*) Calvert v. Redfearn, 2 Dowl. 505.

Personal service necessary.

No attachment can be granted if a personal service and personal demand cannot be effected, even when a party keeps out of the way purposely to avoid service (*e*).

Though on a very strong case a relaxation of the general rule applicable to all attachments may be allowed, where an attachment is the only remedy for a debt, yet in the case of an award, where there is another remedy by action, the rule will be strictly adhered to (*f*), except, according to some cases, where there is an equivalent to personal service, such as an acknowledgment by the party that the award and rule have come to his hands, or where they have been seen in his possession (*g*). Thus where it was proved that one of two unsuccessful parties had served the other with the rule and award in regular form, the court, on an application against them both for non-performance, held personal service unnecessary, since personal knowledge of the award and rule had been brought home to both (*h*).

Unless award, &c., already in party's possession.

Error in copy served.

Care must be taken that the copies served are correct. If the Master's name signed to the allocatur be written Day instead of Dax in the copy served, no attachment will be allowed to issue (*i*).

(*e*) Pyne, In re, 1 D. & L. 703; Stunnell v. Tower, 1 C. M. & R. 88; Doe d. Steer v. Bradley, 1 Dowl. N. S. 259; Winwood v. Holt, 3 D. & L. 85; Read v. Fore, 1 Chitt. 170.

(*f*) Green v. Prosser, 2 Dowl. 99; Anon. 12 Mod. 257; Richmond v. Parkinson, 3 Dowl. 703; Whalley, In re, 3 D. & L. 291.

(*g*) Brander v. Penleaze, 5 Taunt. 812; Dicas v. Warne, 1 Scott, 537; Anon. 1 D. & R. 529.

(*h*) Bower, In re, 1 B. & C. 264.

(*i*) R. v. Calvert, 2 C. & M. 189. See Smith & Reeves, In re, 5 Dowl. 513.

SECTION III.

THE COURSE OF THE MOTION FOR AN ATTACHMENT..

Entitling affidavits on the motion.

1. *Affidavits on the motion for an attachment.*]—If there be a cause in court, and the reference be by rule of court, judge's order, or order of Nisi Prius, the affidavits on which the motion for an attachment is made must be entitled in the cause referred (*b*). The affidavit verifying the power of attorney under which an agent has acted in making the demand must be entitled in like manner or the rule will be refused (*c*).

But when the reference is by agreement out of court under the statute, and there is no cause in court, the affidavits need not be entitled at all, though they are often entitled "In the matter" of the parties to the submission.

Affidavits on showing cause.

On some occasions it has been held that after the rule nisi for an attachment has been granted, the affidavits in showing cause ought to be entitled, "The Queen against [the party sought to be brought into contempt,]" on the ground that there is a proceeding in court between the crown and the individual as soon as the rule nisi has been granted (*d*); but later decisions show that whether the reference be in a cause or under the statute, they ought to be entitled in the same manner as the affidavits on which the motion has been grounded should be entitled, for the Crown is no party until the rule for the attachment has been made absolute (*e*).

Entitling rule nisi.

The rule nisi for the attachment is headed in the manner prescribed for the affidavits on which the motion is made.

(*b*) Whitehead v. Firth, 12 East, 166; Wood v. Webb, 3 T. R. 253.

(*c*) Doe d. Clarke v. Stillwell, 6 Dowl. 305; Bevan v. Bevan, 3 T. R. 601; Bainbrigge v. Houlton, 5 East, 20; Houghton & Fallowes, In re, 2 M. & P. 452.

(*d*) Bevan v. Bevan, 3 T. R. 601; R. v. Sheriff of Middlesex, 3 T. R. 133; R. v. Jones, 1 Stra. 704.

(*e*) Whitehead v. Firth, 12 East, 166; R. v. Harrison, 6 T. R. 60; Wood v. Webb, 3 T. R. 253; Houghton & Fallowes, In re, 2 M. & P. 452.

And the affidavit of personal service of the rule nisi should be entitled in the same manner as the rule nisi (*f*).

Affidavit of service. Affidavits after attachment granted.

After the attachment has once been granted, even although it have not issued, every affidavit on a motion to set it aside, or in any matter concerning it, must be headed, "The Queen against [the party attached]" (*g*).

An objection to the want of a title to the affidavits, when it is necessary, cannot, it seems, be waived by consent, and the court will not look at them when deficient in this respect (*h*).

Affidavit verifying award.

The affidavit on which the application is made must verify the award. If there be an attesting witness to it he must, according to the same rules which apply to other written instruments also, be the party to attest its due execution.

Whether it must show award made in time.

The affidavit should state the date of the execution, or at least should show that the award was made within the authorized time (*i*). Credit, however, is sometimes given to the award itself as being made on the day it purports to be made; and it has been said that when there is nothing to induce suspicion, the affidavit of the execution of the award need not state when it was executed (*k*). On one occasion an objection to the want of a statement that the award of an umpire was made within the proper period, was held to be cured, when it appeared by the jurat of the affidavit to the execution of the award, that the affidavit itself was sworn before the expiration of the time limited for making the award (*l*).

Verifying enlargement when necessary.

When the time has been enlarged, unless the enlargements have already been made part of the rule of court with the submission, there must be an affidavit stating that it has been so enlarged, and that the award has been made within

(*f*) Houghton & Fallowes, In re, 2 M.& P. 452; Chitty's Forms, 677.

(*g*) R. v. Sheriff of Middlesex, 7 T. R. 439; Whitehead v. Firth, 12 East, 166.

(*h*) Owen v. Hurd, 2 T. R. 643.

(*i*) Wohlenberg v. Lageman, 6 Taunt. 251; Trew v. Burton, 1 C. & M. 533.

(*k*) Doe d. Clarke v. Stillwell, 8 A. & E. 645; Stephenson v. Browning, Barnes, 56; Wohlenberg v. Lageman, 6 Taunt. 251.

(*l*) Trew v. Burton, 1 C. & M. 533.

the enlarged time (*m*). If the enlargements have been made by judges' orders, not purporting to have been made by consent, there should, it seems, be an affidavit that they have been made by consent (*n*). A recital of the enlargements in the award does not dispense with the necessity of this proof (*o*). But if the enlargements appear as part of the rule of court, there need not be any affidavit to prove them, for the rule itself is evidence that they have been sufficiently verified; for credit must be given to the court that they have not made them a rule without a proper affidavit according to the practice (*p*).

Where, however, the submission required that the enlargements should be made by the arbitrator's indorsements and a judges' order, though the submission with the indorsements was made a rule; the court refused to presume that judge's orders were obtained so as to render the enlargements valid; as if there were orders produced that would have appeared on the face of the rule, which would have been drawn up on reading those orders as well as the indorsements (*q*).

Affidavit must show demand and service.

It must be stated in the affidavits that all the steps previously shown to be necessary to bring the party into contempt have been taken. They must, therefore, be careful to show a proper demand of performance, and to allege personal service at the time of the demand, of copies of the rule and award; also of a copy of the Master's allocatur, when there is one, and the taxed costs are demanded; and where an agent makes the demand under a power of attorney, of a copy of that document. They must also aver, that at the same time the originals of these several instruments were

(*m*) Wohlenberg v. Lageman, 6 Taunt. 251; George v. Lousley, 8 East, 13.

(*n*) Halden v. Glasscock, 5 B. & C. 390; George v. Lousley, 8 East, 13.

(*o*) Wohlenberg v. Lageman, 6 Taunt. 251; George v. Lousley, 8 East, 13; Halden v. Glasscock, 5 B. & C. 390; Davis v. Vass, 15 East, 96.

(*p*) Dickins v. Jarvis, 5 B. & C. 528; Smith & Reeves, In re, 5 Dowl. 513; Barton v. Ranson, 6 Dowl. 384; Doe v. Amey, 8 M. & W. 565; Peebles v. Hay, 8 Jur. 338.

(*q*) Mason v. Wallis, 10 B. & C. 107.

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produced and shown. There must be an affidavit of the due execution of the agent's power of attorney, and it must be made by the attesting witness, for there must be the proper legal evidence of the delegation of the authority (*r*).

Notice of enlargement.

If the time have been enlarged, the affidavit must state that notice of that fact, and that the award was made within the enlarged time, had been given to the party charged at or before the time of the demand (*s*).

Non-performance of award.

It should likewise be sworn that the award has not been performed, and if money be awarded that it has not been paid. If the demand for the sum awarded be made under a power of attorney, the affidavit in which it is sworn that the money is still unpaid may be made by the attorney; there is no necessity, in such case, that the party entitled should himself make the affidavit (*t*).

Performance of condition precedent.

The affidavits must specifically aver the performance of every act necessary as a condition precedent to entitle the party under the award. Hence, where an award directed that either party who paid the whole of a certain sum might recover back a moiety from his opponent; it was held not enough to swear that the latter had had notice of the payment of the whole sum by the party seeking the attachment, and an attachment was refused as to that portion of the money demanded for want of a positive affidavit that it had in fact been paid (*u*).

Misnomer in the affidavit.

Where a true copy of the award had been served on the defendant, and the original duly shown him, a misnomer of the umpire's name in the affidavit of service was held immaterial (*x*).

Affidavit of award lost.

Though the original award is usually produced and sworn to, yet if it be lost, on an affidavit stating that fact a motion for an attachment may be made on a copy (*y*).

Affirmation of Quaker

The statement, verified by the affirmation of a Quaker or

(*r*) Laugher v. Laugher, 1 C. & J. 398; S. C. 1 Dowl. 284.
(*s*) Wohlenberg v. Lageman, 6 Taunt. 250.
(*t*) R. v. Paget, 9 Dowl. 946.
(*u*) Smith & Reeves, In re, 5 Dowl. 513.
(*x*) Smith & Reeves, In re, 5 Dowl. 513.
(*y*) Robinson v. Davis, 1 Stra. 526.

Moravian, is as valid a ground of motion as the affidavit of another person (*z*). Even before the recent statutes, where an affirmation was admissible only in civil cases, an attachment for non-performance of an award, though criminal in form, being a civil process in substance, might be obtained on the affirmation of a Quaker (*a*). or Moravian.

II. *The rule nisi for an attachment.*]—An attachment cannot be moved for on the last day of the term, nor can cause be shown against it on that day (*b*). No motion on last day of term.

An attachment may issue against one alone of several defendants (*c*).

If an award direct costs to be paid in equal proportions by three different persons, there must be separate attachments against each (*d*). Separate attachments.

The rule is drawn up on reading the rule embodying the submission, the award, the affidavit of the execution of the award, and the other affidavits stating the facts necessary to bring the party into contempt. Though a rule to set aside an award will be drawn up on reading a verified copy of the award, or an affidavit verifying the award (*e*), according to the practice in the Queen's Bench it is necessary, when the intention is to enforce the award, to draw up the rule on the original award (*f*). On reading what, rule drawn up.

When the award is handed in to the officer of the court to draw up the rule for the attachment, it is competent for him to object to the want of a stamp on the award, and the court will sanction his refusal to draw up the rule (*g*). Drawing up rule on unstamped award.

(*z*) 9 G. IV. c. 32; 7 & 8 W. III. c. 34; 1 & 2 Vict. c. 77.

(*a*) Powell v. Ward, cited in R. v. Bell, Andr. 200; Taylor v. Scott, cited in Atcheson v. Everitt, Cowp. 394; Gellibrand, In re, 1 D. & R. 121; 2 Tidd, Pract. 838, 9th Ed.

(*b*) Watkins v. Phillpotts, M'Lel. & Y. 393; Anon. 3 Smith, 118; Kerr v. Jeston, 1 Dowl. N. S. 340.

(*c*) Richmond v. Parkinson, 3 Dowl. 703.

(*d*) Gulliver v. Summerfield, 5 Dowl. 401.

(*e*) See P. 3, ch. 9, s. 5, d. 1.

(*f*) Ex relatione, of the officers of the Rule Office of the Court of Queen's Bench.

(*g*) Hill v. Slocombe, 9 Dowl. 339.

Rule nisi only.

The rule for the attachment will not be absolute in the first instance, only a rule to show cause (*g*). Though according to the practice of the courts, when a rule of court directs the payment of costs and nothing else, and they are not paid, a rule absolute for an attachment will be granted in the first instance, yet when under an award nothing but costs are claimed, the court will still only grant a rule nisi (*h*).

Personal service of rule nisi.

The rule nisi for an attachment must in general be served personally. On one occasion, the court refused to engraft on the rule nisi, that service of the rule at the dwelling-house should be deemed good service, upon an affidavit that the defendants were shy and difficult to be met with, and that the deponent had to try for two months before he could serve the defendants with the award (*i*). However, on a very strong case being made out that the party keeps out of the way to avoid being served, the court will sometimes, it seems, dispense with personal service (*k*).

Waiving want of service.

If the party appear to the rule nisi, he waives the necessity of personal service, even if, when he appears to show cause, he take the objection that there has been no personal service of the rule (*l*). So also, if he consent to its enlargement, he cannot afterwards rely on the want of such service (*m*); since the service of the rule nisi is merely to bring the party into court to explain his disobedience for the contempt already incurred in disobeying the rule embodying the submission.

Showing as cause irregularity in

III. *What may be shown for cause against the rule.*]—Any deficiency or irregularity in the demand, or any want

(*g*) Gifford v. Gifford, Forr. 80; Rex v. —, 2 Chitt. 57; Chanler v. Driver, 12 Mod. 317. See Darbyshire v. Cannon, 1 Mod. 21.

(*h*) Daniell v. Beadle, 1 M. & G. 960; S. C. Daniels v. Wealds, 9 Dowl. 44. Semble, mis-reported.

(*i*) Garland v. Goulden, 2 Y. & J. 69.

(*k*) Barwick, In re, 3 Dowl. 703; Fennell, In re, 3 Dowl. 703, note.

(*l*) Levi v. Duncombe, 1 C. M. & R. 737.

(*m*) Cartwright v. Blackworth, 1 Dowl. 489.

of proper personal service of the rule, or award, or other necessary documents, as directed in a previous section, may be shown to the court as a ground of resisting the motion (*m*). demand or service.

Any material defect in the affidavits on which the rule nisi has been obtained may also be relied on. Defect in the affidavits.

In some cases reliance may be made on the framing of the award, which, as we have before seen, may be such as not to warrant an attachment, though a good ground of action; as where there is no direction in the award to pay the amount found due (*n*). No contempt on face of award.

Objections to the validity of the award apparent on its face may be taken advantage of in answer to the motion for an attachment (*o*), even although the time limited for moving to set aside the award has expired, for the party sought to be charged would be without remedy, if the attachment were granted notwithstanding the illegality of the award; whereas, if the other party were left to his remedy by action on the award, it would be competent to the defendant to take advantage of the defects apparent on its face (*p*). Defects on face of the award.

The court, it is laid down in many cases, will not allow any extrinsic objections to be alleged. The partiality or misconduct of the arbitrator (*q*), his omission to decide on some of the matters referred, though good grounds for a motion to set aside the award, cannot be alleged in bar of an attachment. Reference cannot even be made to the pleadings in the cause referred, at least not without an affidavit identifying them, so as to show the award defective on its face (*r*). Not misconduct of arbitrator or matter omitted.

On one occasion the courts refused to allow a party to prove that the award was made beyond the limited period, Award made after time ex-

(*m*) Ante, p. 567.

(*n*) Seaward v. Howey, 7 Dowl. 318; ante, p. 563.

(*o*) Randall v. Randall, 7 East, 80.

(*p*) Pedley v. Goddard, 7 T. R. 73; Macarthur v. Campbell, 2 A. & E. 52; Dubois v. Medlycott, Barnes, 55; Stephenson v. Browning, Barnes, 56; Lucas v. Wilson, 2 Burr, 701; Holland v. Brooks, 6 T. R. 161.

(*q*) Brazier v. Bryant, 10 Moore, 587; Anon., Andr. 299; Manley v. Bray, 11 Jur. 521.

(*r*) Rowe v. Sawyer, 7 Dowl. 691.

or that the submission had been revoked (*s*); in two subsequent instances, however, proof that the award was a nullity by reason of a revocation of the arbitrator's authority was held admissible and conclusive against the right to an attachment (*t*).

pired or submission revoked.

The refusal of the courts, in other instances, to set aside awards, merely because the arbitrator's authority had been revoked, proceeding on the ground that the award is a nullity and cannot be enforced, and that therefore the interference of the court is unnecessary, shows clearly their opinion, that the revocation would be a good answer to an application for an attachment, for where the party has any means of putting a bad award into execution, they show no hesitation in setting it aside (*u*).

Validity of award only doubtful.

Defects apparent on the face of the award, though not sufficiently clear to induce the courts to set it aside, may often be urged successfully in answer to a motion for an attachment for non-performance, since if the award be of doubtful validity, the court will neither set it aside or grant an attachment (*x*).

Party not liable to attachment.

If the party sought to be attached fall under the class of persons above enumerated, against whom an attachment cannot be issued, he may prove the fact by affidavits, and the rule will be dismissed (*y*).

Award performed as far as possible.

He may prove, in answer to the application, that he has fully performed all the directions in the award (*z*), or at least all that are in their nature possible (*a*), or all that can be complied with without subjecting himself to an action for interfering with the rights of others existing previous to the submission (*b*).

(*s*) Holland v. Brooks, 6 T. R. 161.

(*t*) Milne v. Gratrix, 7 East, 607; King v. Joseph, 5 Taunt. 452. See Kerr v. Jeston, 1 Dowl. N. S. 340.

(*u*) Doe d. Turnbull v. Brown, 5 B. & C. 384; Hobbs v. Ferrars, 8 Dowl. 779; Worrall v. Deane, 2 Dowl. 263.

(*x*) Hutchins v. Hutchins, Andr. 297. See Wrightson v. Bywater, 3 M. & W. 199.

(*y*) See ante, p. 561.

(*z*) See P. 3, ch. 2, s. 1, p. 473. Russell v. Yorke, 4 Scott, 422.

(*a*) Hanson v. Boothman, 13 East, 21.

(*b*) Doddington v. Bailward, 7 Dowl. 640; Smith & Reeves, In re, 5 Dowl. 513.

When bankruptcy an answer.

If, however, the inability to perform the award or the liability to an action for non-performance, accrue from the party's own conduct subsequent to the submission, such inability or liability will be no excuse; as, for instance, if pending the reference he sell the property in dispute, and thus cannot deliver it up pursuant to the award (*c*). A party ordered to deliver up certain goods cannot discharge himself from an attachment by showing that subsequent to the submission, but before the award, he had become a bankrupt, but had not obtained his certificate, and that the property directed to be given up had been taken possession of by the messenger of the Court of Bankruptcy (*d*). In one instance, however, it is said that where the defendant was a bankrupt and incapable of paying the sum awarded, the court refused to grant an attachment against him for non-payment of it (*e*).

Unless the certificate bars the claim under the award, bankruptcy is in no case a defence. But where the party ordered by the award to pay a sum of money or costs is discharged by his certificate from liability, no attachment can issue (*f*).

The following case, inserted here as connected with the effect of bankruptcy, must not be relied upon as law without reference to later decisions on the subject. A defendant against whom in an action for damages for a tort a verdict was taken subject to a reference, became bankrupt before the award was made. The plaintiff, pursuant to the award in his favor, entered up judgment for the amount of the damages and costs as of a term preceding the bankruptcy. The court held that the plaintiff's claim both for damages and costs was barred by the certificate on the ground that they might have been proved under the commission (*g*).

(*c*) Tyler v. Campbell, 5 Bing. N. C. 192.

(*d*) Hemsworth v. Brian, 1 C. B. 131.

(*e*) Anon. K. B. 1 Cromp. 3d Ed. 265, cited 2 Tidd, Pract. 835, 9th Ed.

(*f*) Baker's Case, 2 Stra. 1152; R. v. Davis, 9 East, 318. See P. 3, c. 1, d. 7, p. 465, effect of award on bankrupt.

(*g*) Beeston v. White, 7 Price, 209. See, however, Ex parte Charles, 14 East, 197.

Where the arbitrator ordered the plaintiff to pay the defendant a certain sum and the costs of the reference, (the event of the award entitling the defendant to the costs of the cause,) and the plaintiff became bankrupt between the date of the reference and the making the award, and the costs were afterwards taxed, and judgment of nonsuit signed, it was held that the claim to the costs was not barred by the certificate, but might be enforced by attachment (*h*).

Inability to pay no answer.

Mere inability from want of means to pay a sum awarded cannot be urged in excuse (*i*).

Matter not brought forward no defence.

A cross demand, which might have been brought before the arbitrator as one of the matters in difference, but which was not so brought, cannot be set up as a defence or used to reduce the amount awarded (*k*).

Foreign attachment no answer.

It is no answer to an attachment for not paying a sum of money awarded, (though it may be a good plea to an action on the award,) that the money awarded has been attached in the hands of the party ordered to pay by process of foreign attachment at the suit of a creditor of the successful party. Even if it have been paid over to the creditor under the foreign attachment, payment must nevertheless be made to the party entitled under the award (*l*); for the award of the arbitrator is as much to be obeyed as the judgment of the court, which cannot be defeated by any intermediate step of this kind, and payment in pursuance of the award under the attachment for contempt will be an answer to any proceedings in the Sheriff's Court (*m*).

Cross motion.

IV. *Discharging or making absolute the rule.*]—Cross motions for an attachment, and for setting aside the award, are often heard together (*n*).

(*h*) Haswell v. Thorogood, 7 B. & C. 705; Jacobs v. Phillips, 1 C. M. & R. 195.

(*i*) Bac. Ab. Arb. E. 4.

(*k*) Smith v. Johnston, 15 East, 213.

(*l*) Coppell v. Smith, 4 T. R. 312; Grant v. Hawding, 4 T. R. 313, note; Ingram v. Bernard, 1 Lord Raym. 636.

(*m*) Caila v. Elgood, 2 D. & R. 193.

(*n*) R. v. Bingham, 2 Tyrw. 46, note, p. 47; 2 Tidd, Pr. 845, 9th Ed.; Lodge v. Porthouse, Lofft, 388.

If the rule be discharged on a preliminary point, as on a technical objection to the affidavits, it will, it seems, be discharged without costs, but the party taking the objection will be allowed, without waiving his advantage, to go into the merits, so as, if successful on them to have the rule discharged with costs (*o*).

Rule when discharged with costs.

If the party do not appear to show cause, the rule may be made absolute on an affidavit of the personal service. This affidavit must be entitled in the same manner as the rule nisi, which is headed as the affidavits on which the motion is made should be headed; therefore if the rule be entitled, "In the matter of A. & B.," and the affidavit of service of the rule nisi be headed, "Between A. plaintiff, and B. defendant, no action having been brought, the court will refuse the application (*p*).

Making rule absolute, no cause shown.

Entitling affidavit.

When there is any fair ground for giving indulgence to a party in contempt, though it be not sufficient to induce the court to refuse or set aside the attachment, the court will often direct it to be stayed for a certain period in the office, or will impose such terms as seem equitable (*q*).

Making rule absolute on terms.

v. *Proceedings on the attachment.*]—When the rule for an attachment is made absolute, the rule must be drawn up by the Master, after which the attorney must make out the attachment on parchment, and get it signed at the Master's office, and sealed according to the practice of the court.

The attachment.

The attachment is to be taken to the Sheriff's Office, and a warrant obtained on it. On this warrant the sheriff's officer will arrest the party (*r*). At one time, when it was considered that all attachments were criminal process, it was

Arresting the party.

Attachment on award civil process.

(*o*) Chamberlain, In re, 8 Dowl. 686.

(*p*) Houghton & Fallowes, In re, 2 M. & P. 452.

(*q*) Caila v. Elgood, 2 D. & R. 193; Smith & Reeves, In re, 5 Dowl. 513; Tyler v. Campbell, 5 Bing. N. C. 192; Palmer's case, 12 Mod. 234. See P. 3, ch. 6, s. 1, d. 5, p. 565.

(*r*) 2 Archb. Pract. 1258, 1269, 7th Ed. See New Rules affecting the practice on the Crown side of the Court of Queen's Bench, made pursuant to 6 & 7 Vict. c. 20, s. 16.

held that the arrest might be made on a Sunday; but that is not law now, since it has long been settled that an attachment for non-performance of an award is only in the nature of a civil execution (*s*).

Setting aside attachment.

If an attachment have been irregularly obtained, it will be set aside; but when an attachment has been granted on the usual affidavit of service, the court will not set it aside on the mere affidavit of the party that he has never been served, unless he can show some mistake in the service, as that another person has been served for him; since as process is usually served without a witness, it would lead to great inconvenience if a different rule should prevail (*t*).

Tendering amount to sheriff's officer.

When a party is arrested under an attachment for contempt of court in not paying money, he is not entitled to be discharged on tendering the amount to the officer (*u*).

Party not always imprisoned until performance.

As an attachment for non-performance of an award is in the nature of a civil execution, it is laid down in a valuable book of practice that interrogatories are never filed, but that the party is detained in custody until he pay the money ordered, or otherwise perform the award (*x*).

When the contempt is only non-payment of money awarded, probably the doctrine above laid down may be good. But it certainly does not hold as a general rule in all cases, or in all the courts.

Examined on interrogatories.

In some cases in the Queen's Bench, the usual course pursued in the case of attachments of a criminal character is adopted, and interrogatories are filed, and the Master of the Crown Office has to report whether the party be in contempt or not. His report that the party is guilty of a contempt is conclusive, and though affidavits in mitigation are admissible, none will be received in denial of the contempt. The court will then sometimes impose a fine, and commit the party until it be paid (*y*).

Reported in contempt, fine imposed.

Reported not in con-

If the Master report that no contempt has been committed,

(*s*) R. v. Myers, 1 T. R. 265.
(*t*) Hopley v. Granger, 1 B. & P., N. R. 256.
(*u*) Pitt v. Coombs, 3 N. & M. 212.
(*x*) 2 Archb. Pr. 1273, 7th Ed.
(*y*) Coulson v. Graham, 2 Chitt. 57.

the party will be discharged. An award ordered the defendant to sign a written authority to certain auctioneers to sell an estate in which he was interested. On his refusal an attachment issued against him out of the King's Bench, and he put in bail to answer to interrogatories before the Master. In answer to the interrogatories, the defendant set out a clause in the award, on which he contended that he was not bound to execute the authority to sell, until it appeared that certain parties could make a good title to the estate, which had not been done. Upon this the Master reported him not to be in contempt, and the attachment was discharged (*z*).

Attempt, discharged.

On a late occasion, when a party in custody for not performing an award, directing her to convey an estate, had ruled the prosecutor to file interrogatories, and they had been filed, but she had not been ruled to appear before the examiner according to the usual practice in attachments; the court discharged her on bail to appear before the examiner when the prosecutor chose to call her, although the objection was taken that she was in custody on what was treated as a civil process, and that the court had no power to interfere (*a*).

Discharged on bail to appear and be examined.

A recent case in the Common Pleas has thrown considerable light on the practice in this respect. An attachment was granted against a party then bankrupt, who, by an award made before the fiat, was ordered to pay a sum of money, and to deliver some wine warrants, and wine in bottles, to his opponent. The bankrupt was arrested on the attachment, and afterwards discharged on bail, on entering into recognizances, with two sureties, to appear and answer interrogatories when filed, he himself being sworn before a judge at chambers to answer such interrogatories when filed. The interrogatories were filed, and notice given to the bankrupt. He subsequently moved to be discharged from the attachment, to have the recognizances cancelled, and the interrogatories taken off the file for irregularity, on the

Practice in Common Pleas.

Arrest, discharge on recognizance with sureties.

Filing interrogatories.

(*z*) Wood v. Griffith, 1 Wils. C. C. 34; S. C. 1 Swanst. 43.

(*a*) Doe d. Clarke v. Stillwell, 2 Dowl. N. S. 18.

ground that he ought to have been sworn in court, instead of before a judge at chambers. The court refused the application, holding the only irregularity was that of the bankrupt, who should have come before the court to have been sworn in the first instance. Afterwards he appeared in court, was sworn to answer the interrogatories, and by his answers thereto excused himself for non-performance of the award, as to the payment of the money, on the ground of his bankruptcy, and as to the non-delivery of the wine warrants, and wine in bottles, that the former were in the custody of bankers who claimed a lien on them, and that the latter were in the possession of his assignees. The court, of motion, referred it to a Master to examine the matters of the interrogatories and answers, and to report thereon. The Master having reported that the bankrupt was in contempt for non-performance of the award, and that his excuses were insufficient, the court ordered him to attend, with his bail, on a day appointed. After an adjournment by consent to a further day, on which the bankrupt attended, the matter was heard. The bankrupt filed an affidavit in mitigation, alleging, among other things, the same excuses for non-performance which he had alleged before. The affidavits in aggravation on the other side stated, that the assignees had not taken the wine in bottles, as the bankrupt had stated that he had no beneficial interest in them, and that he held them as trustee for his opponent. They stated also that the bankrupt admitted that he had property enough to satisfy all his creditors.

Party sworn in court to answer.

Answer on oath, excuse for non-performance.

Reference to the Master.

Party reported in contempt.

Affidavits in mitigation and aggravation.

Cur. ad vult.

The court, holding that the prisoner had no valid excuse for disobedience, took time to consider the proper course to be adopted, and the prisoner on a later day having been brought up, committed him till the last day of term, when he was to be brought up to receive sentence, and in the mean time required affidavits as to the value of the wines. On the day, affidavits having been produced on both sides as to the value, Wilde, C. J., passing sentence, said, "The non-performance of the award is not a single act of contempt which will be purged by a definite period of imprisonment; but

Party brought up for sentence.

Continuing disobedience not purged by

the prisoner may, at the expiration of the term for which the court upon this occasion sentences him, if the award shall then remain unperformed, be again brought up to answer for his continuing contempt. Nor will he thereby, as I conceive, be relieved from an action on the award. It is evident from the statements contained in the several affidavits, that the prisoner can, if he pleases, perform the award, and his not doing so is a wilful and pertinacious contempt of the authority of the court. With a view, therefore, to compel him to act justly towards the prosecutor, the sentence of the court is that he be imprisoned in the Queen's Prison for the space of two years from this date, unless he shall sooner comply with the terms of the award. If he thinks fit for so long a time to withhold the property of the prosecutor, he may consider himself the author of his own imprisonment. This commitment, therefore, will enure until the sums awarded and the costs are paid, and the warrants and wine are delivered up, or their value paid."

Imprisonment for a term.

Sentence of imprisonment for definite time subject to discharge on performance.

The rule of court drawn up pursuant to this judgment, ordered the bankrupt to be imprisoned for two years, and did not contain any words for entitling him to his discharge on performance of the award (*b*).

Rule embodying sentence.

Where after being taken into custody on an attachment for not performing an award to pay a sum of money, the prisoner became bankrupt, and obtained his certificate, it was decided in an old case that he was entitled to be discharged out of custody (*c*).

Discharging bankrupt.

A bankrupt defendant, who, after obtaining his certificate, was arrested on an attachment for not performing an award, applied for his discharge under the following circumstances. The award, made on the 30th of April, ascertained the amount of a partnership account, the subject of a suit in Chancery, due from the defendant, and ordered him to pay it to the plaintiff on the 30th of May. On the 14th of May the defendant became a bankrupt. It was held that the ascertained debt was proveable under the commission, but not

(*b*) R. v. Hemsworth, 3 C. B. 745.

(*c*) Baker's Case, 2 Stra. 1152.

the costs in Chancery, which had not been taxed before the bankruptcy, and that the certificate was no discharge as to the costs, to which the plaintiff had only an inchoate right before taxation. The court ultimately directed that on payment of the costs of the Chancery suit the defendant should be discharged from the attachment (*d*).

Discharging insolvent.

By the 33 G. III. c. 5, s. 4, a party in custody on an attachment for non-payment of money or costs, pursuant to an award, was put upon the same footing as a common debtor, and as such was entitled to the benefit and subjected to the provisions of the Lord's Act, 32 G. II. c. 28 (*e*).

Costs of attachment.

If the defendant is to be discharged from an attachment on certain terms, and on paying the costs of the attachment, the costs of an inquiry before the Master, rendered necessary by the defendant's conduct, in order to enable him to obtain his discharge, will be considered as costs of the attachment (*f*).

(*d*) R. v. Davis, 9 East, 317.
(*e*) R. v. Curwen, 1 Moore, 494.
(*f*) Tyler v. Campbell, 5 Bing. N. C. 193.

CHAPTER VII.

ENFORCING THE AWARD UNDER THE STATUTE OF VICTORIA.

Contents of the seventh chapter.

How advantage may be taken, in the case of awards within the cognizance of the courts of law, of the provisions of the statute of Victoria, which gives to rules of court for the payment of money the effect of judgments, is considered in the first section of this chapter.

The second section investigates the practice of obtaining such rules to enforce payment of a sum awarded.

SECTION I.

RULE TO PAY THE AMOUNT AWARDED.

No summary process to levy sum awarded.

Till recently, when there was no cause in court, though the submission were made a rule of court, there was no summary method of enforcing payment of a sum of money

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awarded by levying it out of the debtor's property. It is true the amount might have been recovered by action on the award, and then execution might have issued against his goods and lands, but the process was slow and expensive: the penal process by attachment was also open, but if the party were out of the jurisdiction of the courts, he could not be attached, or if, after being arrested, he chose to lie in prison, in neither case, however ample the property, could satisfaction of the debt be obtained. Now, however, the recent statute, the 1 & 2 Vic. c. 110, s. 18, which gives to a rule of court for the payment of money the effect of a judgment, affords a simple and summary method of obtaining execution as on a judgment for the amount awarded, whenever the submission can be made a rule of court.

ed before statute.

Statute 1 & 2 Vict. c. 110, s. 18.

That section provides "that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, and of the Court of Review, in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

How to proceed under the Act.

In one of the first cases after the passing of the act, in which its provisions were attempted to be taken advantage of to enforce an award, the party, after an award in his favor, without applying to the court, made the submission

a rule of court, taxed his costs, and issued a fieri facias for the amount awarded and the costs. But the court set the execution aside as not warranted by the statute, on the ground that the rule embodying the submission could not be considered a rule *by which money was payable* (*a*).

Construction of the statute.

Lord Denman, C. J., in giving judgment, said, "In no one instance of submission to arbitration is any money whatever to be payable by the rule; and then the question is, whether if money be awarded to be paid, it becomes payable by the rule, by reference to it, by the consent of the parties that an award may be made, and, as it were, embodying an award made by consent into the rule by relation, as if the award itself was part of the rule, and whether this goes to make it payable by the rule within the meaning of the act. It is undoubtedly money payable by something arising out of and connected with the rule, but then can the award be engrafted on the rule, so as to make the money payable by the rule? The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself.

"These rules are to have the effect of judgments, which are to charge the land; and therefore the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that the purchasers or creditors may know what it is. Judgments are to bind the land from the time directed by law. But when rules like this are made, they ought to bind the land at the time they are entered; but at that time there is nothing to inform anybody of the charge; the amount may not be ascertained for a year afterwards.

"It may be said that when the award is made, it may be binding from that time. But then there is no process, or any known mode of proceeding, at present at least, for making the award a matter of record; and if so, then a rule of this sort could have no effect until that was done; and any execution issued before that would be premature.

(*a*) Jones v. Williams, 11 A. & E. 175.

Then, again, there are great difficulties attending it, supposing the award could be put upon any rule, so as to make it matter of record. There may be not merely sums payable by one party alone to the other, but there may be cross payments arising out of their mutual claims; these would have to be balanced. There may be payments dependent upon other things directed by the award. There may be other difficulties not occurring at the moment. We therefore think the power of issuing execution on a rule must be confined to cases where the money payable by the rule is expressed in the rule itself, but which is not the case here.

Proper course to move for rule to pay sum awarded.

"There is no difficulty in giving effect to the Act of Parliament as to awards, if a proper case is made out: and that is by calling on the delinquent party to show cause why he should not pay a certain sum of money pursuant to the award. If that rule be made absolute, an execution may issue for the sum distinctly specified in the rule so to be obtained." (*b*).

On an action of trespass being brought in the Exchequer for the irregular execution in the case just cited, that court confirmed the view entertained by the Court of Queen's Bench, and Alderson, B., said, "In the case of an award it would be monstrous to say, that any sum of money is payable under the order of the court. The order of the court there is, that the party do submit to the arbitration of A. B., und unless you incorporate the award (which is an act long subsequent) with the rule of court, it would be making the court order the payment of a sum of money, the propriety of which depends on the judgment of a third party, and of which the court knows nothing. If such were the law the court might commit the greatest injustice. Suppose a submission to arbitration and an award in Trinity Term; in the vacation a writ of capias ad satisfaciendum might issue, and is the party to remain in custody the whole of the vacation up to Michaelmas Term, before he can apply to set aside an award which may have been most improperly made against

(*b*) Jones v. Williams, 11 A. & E. 175. See Rickards v. Patterson, 8 M. & W. 313.

him. The sounder rule is, that no execution should issue until the court has ascertained for itself the propriety of the award, and has made an order for the payment of the money awarded" (*c*).

The principles thus laid down have been sanctioned by all the courts (*d*); and it has grown to be the settled practice, when it is wished to obtain the benefit of the statute, to apply to the court for a rule calling upon the party against whom the award is made, to show cause why he should not pay the amount awarded.

Rule granted by common law power of the courts.

The *power* to grant such a rule is not given by the statute of Victoria. The rule is granted by virtue of the inherent authority of the courts existing previous to the statute, and only not exercised previously, because before the Act such a rule was useless; for the rule founded on the submission in effect ordering the party to obey the award was sufficient for an attachment, and as a rule directing a party to pay the money awarded could have been enforced by no other penalty, the application for such a rule could have only delayed by one superfluous step the obtaining the process of attachment, to which the party was entitled without it. Now, however, since the statute makes a distinction between rules for obeying an award, and rules for the payment of money, giving the effect of judgments to the latter only, it is highly beneficial that the courts should thus exercise their general jurisdiction in making such rules. (*e*).

Statute gives it effect of a judgment.

Discretionary to grant rule.

It has been argued at times that the rule in question is due to the subject ex debito justitiæ (*f*); but the whole class of cases on the point shows that it is as discretionary with the court to grant such a rule, as it is to grant an attachment, and that in the exercise of their discretion, the courts will be guided by much the same principles as influence them in allowing or refusing the penal process of con-

(*c*) Jones v. Williams, 8 M. & W. 349.

(*d*) Doe v. Amey, 8 M. & W. 565; Wilson v. Foster, 6 M. & G. 149.

(*e*) Doe v. Amey, 8 M. & W. 565; Neale v. Postlethwaite, 1 Q. B. 243.

(*f*) Spence v. Clarkson, 1 Dowl. N. S. 837; Rule v. Bryde, 1 Ex. R. 151.

tempt. And the rule will be refused when the right is doubtful, as when an attorney who claims a lien on the amount awarded seeks in this way to enforce it (*g*); or where the validity of the award seems questionable; for example, where the arbitrator has awarded joint damages to the plaintiff and a stranger to the action made a party to the reference, instead of separate damages to each (*h*): since the same reason applies here as is of force with respect to attachments, that in each case if the rule be granted the judgment is final; whereas the parties ought to have an opportunity of raising their objections to the award for deliberate decision (*i*).

Rule refused when right doubtful.

If the party be proceeding to obtain the benefit of the award by any other legal proceeding at the time of applying for the rule, it will be refused, as an attachment would have been had he moved for one; but where a party had merely filed an affidavit of debt with a view to making the defendant a bankrupt, and the latter had entered into a bond conditioned to pay what might be found due in an action, the court, as no action had been commenced, granted the rule on the party undertaking not to bring an action on the award (*k*).

When party pursues other remedy.

(*g*) Holcroft v. Manby, 2 D. & L. 319. See P. 3, ch. 1, d. 8, p. 467.

(*h*) Hawkins v. Benton, 2 D. & L. 465.

(*i*) Dickenson v. Allsop, 2 D. & L. 657; S. C. 13 M. & W. 722; Spooner v. Payne, 11 Jur. 242.

(*k*) Mendell v. Tyrrell, 9 M. & W. 217; S. C. 1 Dowl. N. S. 453.

SECTION II.

PRACTICE AS TO OBTAINING THE RULE.

In applications for the rule to pay the money awarded the same formalities in the demand of the sum found due, and in the service of the rule embodying the submission, and of the award and allocatur, and other instruments, as are requisite in the case of an attachment, are generally necessary; but under special circumstances, a less strict mode of proceeding will be permitted (*a*).

What demand and service sufficient.

On one occasion, however, Wightman, J., said, "I think enough is done in obtaining this rule without going through the forms necessary in cases of attachments." What kind of service or notice had been attempted in the particular case does not appear in the report (*b*). In another instance, where the defendant, in answer to a letter stating the effect of the award, and demanding the amount, and telling him that the submission had been made a rule of court with a view to issuing execution, wrote that he would send a friend to settle the business; and when afterwards his agent had applied for a copy of the award, and copies of the award and rule, and of the Master's allocatur had been left with his clerk, Patteson, J., granted a rule, though no personal service had been effected (*c*).

Whether personal service necessary.

The fact that the party sought to be affected is resident abroad, and, as appears by a letter from him, is aware of the contents of the award, though it has not been served upon him, is not considered by the Court of Common Pleas a sufficient ground for granting a rule nisi, calling upon him

Party resident abroad.

(*a*) Hawkins v. Benton, 2 D. & L. 465; Rickards v. Patterson, 8 M. & W. 313; Pearson v. Archbold, 2 Dowl. N. S. 769; Tattersall v. Parkinson, 17 L. J. Ex. 208.

(*b*) Doe d. Moody v. Squire, 2 Dowl. N. S. 327.

(*c*) Hawkins v. Benton, 2 D. & L. 465.

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to pay the money, and ordering that sticking up a copy in the Master's office shall be deemed good service (*d*).

Moving on last day of term.

The rule, it would seem, cannot be applied for on the last day of term (*e*).

Rule nisi only.

The rule is only a rule nisi in the first instance, not a rule absolute, for if it were otherwise execution might be issued without any opportunity whatever being given to the party to be affected by it to impugn the validity of the award (*f*).

Form of rule.

The rule simply orders the payment of the amount awarded. It is not necessary that the rule nisi should contain

Abandoning right to attachment.

an undertaking that the applicant abandons his right to move for an attachment, though such a clause has sometimes been inserted (*g*). Nor need it state that the party is at liberty to

Reserving liberty to issue execution.

issue execution; for the permission to issue execution on the rule is not given by the court, which derives no new powers of ordering execution in this case from the Act: but the right to execution is the effect which follows on the rule by force of the statute (*h*).

How drawn up.

On one occasion, where the enlargements of time had been made part of the rule of court and duly verified by affidavit, Patteson, J., though he did not think it necessary, yet recommended as a more prudent course to draw up the rule on reading the affidavits filed when the order of reference was made a rule of court, as well as the affidavits on which the application for the rule was made (*i*).

Rule six day rule.

The rule is a six-day rule, and the time will not be shortened without special circumstances. Where an application for a rule was made within four days of the end of the term, and the Master had drawn it up to show cause the next term, the Court of Exchequer refused to allow it to be amended by

(*d*) Wilson v. Foster, 6 M. & G. 149.

(*e*) Watkins v. Philpotts, M'Lel. & Y. 393.

(*f*) Winwood v. Holt, 3 D. L. 85; Jones v. Williams, 11 A. & E. 175; Rickards v. Patterson, 8 M. & W. 313.

(*g*) Burton v. Mendizabel, 1 Dowl. N. S. 336; Neale v. Postlethwaite, 1 Q. B. 243.

(*h*) Burton v. Mendizabel, 1 Dowl. N. S. 336; Doe v. Amey, 8 M. & W. 565.

(*i*) Peebles v. Hay, 8 Jur. 338.

having it drawn up to show cause on the last day of term, or before a judge at chambers (*k*). The practice of the Court of Queen's Bench seems to be to permit the rule, under particular circumstances, to be made returnable before a judge at chambers (*l*).

Whether cause can be shown at chambers.

The rule nisi must generally be served personally, and where there is reason to believe it can be so served, nothing less will suffice; but if personal service cannot be effected, on a special statement of facts such service will be allowed as shall seem proper (*m*). Thus, on an affidavit showing that personal service could not possibly be effected, the party never leaving his house or opening his door, and that a copy of the rule had been left at the house, Patteson, J., made the rule absolute (*n*).

Service of rule nisi.

Cause cannot be shown against the rule on the last day of term (*o*).

Showing cause last day of term.

On showing cause against it, the same objections may be urged against the validity of the award as are available in answer to an application for an attachment (*p*), therefore the conduct of the arbitrator cannot be gone into by the court (*q*).

Same objections as to an attachment.

Where the defendants, a railway company, had been served with the writ in the action, and their attorney had entered an appearance for them, and had ultimately referred the action, it was held they could not show as cause against a motion for a rule to pay the plaintiff the amount awarded, that the attorney had not been appointed under their corporate seal (*r*).

Attorney of corporation not appointed under seal.

On making the rule absolute, the court will impose such terms as seem equitable, as that a plaintiff shall undertake not to bring an action on the award, the defendant having

Making rule absolute.

(*k*) Arthur v. Marshall, 2 D. & L. 376.

(*l*) Hawkins v. Benton, 2 D. & L. 465, note 471.

(*m*) Jordan v. Berwick, 1 Dowl. N. S. 271; Winwood v. Holt, 3 D. & L. 85; Ansell v. Thomas, H. T. 1845, Ex., cited in Hawkins v. Benton, 2 D. & L. 464, note, 471.

(*n*) Doe d. Steer v. Bradley, 1 Dowl. N. S. 259.

(*o*) Kerr v. Jeston, 1 Dowl. N. S. 340.

(*p*) Kerr v. Jeston, 1 Dowl. N. S. 340.

(*q*) Manley v. Bray, 11 Jur. 521.

(*r*) Faviell v. Eastern Counties Railway Comp., Ex., May 27, 1848.

previously entered into a bond with sureties to abide the event of such an action (*s*).

Rule as to costs.

Though to warrant execution under the statute the rule must state on its face the amount of the money which it directs to be paid, yet when a rule directs costs to be paid it need not specify their amount in order to receive the benefit of the act; for costs stand on a different footing from other sums payable, and execution, it seems, may issue on the rule as soon as the officer of the court has ascertained how much is due for them (*t*). These observations respecting costs do not apply to the case of costs payable under an award, and already taxed by the Master, and demanded by the party before the motion for the rule; for their amount must be stated in the rule.

Interest on sum awarded not recoverable.

When the award orders money to be paid on a specified day, with interest to that day, the rule will be granted for the payment of the amount and interest up to the day, but not beyond; though in an action on the award a jury might have given further interest (*u*).

No scire facias necessary after a year and a day.

Though a year and a day have elapsed since the making of a rule ordering the payment of money or costs, no scire facias or special application to the court is necessary to authorize the issuing of execution (*x*).

(*s*) Mendell v. Tyrrell, 1 Dowl. N. S. 453; S. C. 9 M. & W. 217.

(*t*) Jones v. Williams, 8 M. & W. 349; Hodson v. Patterson, 4 M. & G. 333; Wright v. Burroughes, 2 D. & L. 94.

(*u*) Doe d. Moody v. Squire, 2 Dowl. N. S. 327.

(*x*) Spooner v. Payne, 12 Jur. 282.

CHAPTER VIII.

ENFORCING THE AWARD BY PROCEEDINGS IN THE CAUSE REFERRED.

Contents of the eighth chapter.

It is often convenient for a party in whose favor the arbitrator has determined the cause referred, to enforce the award by issuing execution in the cause for the money or costs awarded, instead of applying for an attachment, or a rule under the statute of Victoria on the award itself; as these latter courses would frequently be more dilatory, and cannot be obtained without a personal demand of payment of the money due, a thing sometimes difficult to effect, and not necessary when proceeding in the cause.

This chapter, therefore, is confined to investigating, in its separate sections, under what circumstances, and in what manner, a verdict may be entered, costs taxed, judgment signed, and execution issued in the cause, according to the effect of the award.

SECTION I.

ENTERING THE VERDICT PURSUANT TO THE AWARD.

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Award in the cause as a verdict.

When a cause is referred at Nisi Prius, and a verdict taken subject to the reference, the award of the arbitrator respecting the cause stands in the place of the finding of the jury, and is followed with similar consequences. The verdict may be entered, the costs may be taxed, judgment may be signed, and execution may be issued, for the amount found due in the cause, and for that portion of the costs in the cause to which, under the submission and award, the party is entitled (*a*).

We have previously seen what sort of finding by the arbitrator will authorize the party in entering a verdict (*b*).

Where no verdict is taken on the reference, and the arbitrator is not empowered to order a verdict to be entered, or being empowered, has not thought fit to direct the entry of a verdict, judgment cannot be signed either for the amount awarded or the costs (*c*).

Pro formâ verdict how far available.

The plaintiff can take no advantage from the pro formâ verdict taken at Nisi Prius, except what the award gives him. Where, after directing a verdict to be entered for the plaintiff on the several issues, the arbitrator awarded to him a gross sum by way of damages in respect of the cause and of other matters in difference, the court held, that although the pro formâ verdict was not vacated, the plaintiff could not avail himself of it in any way, for there were no means of ascertaining how much of the damages was due in respect

(*a*) Borfowdale v. Hitchener, 3 B. & P. 244; Lee v. Lingard, 1 East, 400; Cromer v. Churt, 15 M. & W. 310; S. C. 15 L. J., Ex. 263.

(*b*) See P. 2, ch. 6, s. 3, d. 2, p. 352.

(*c*) Grundy v. Wilson, 7 Taunt. 699.

of the cause (*d*). It was also said, there would be a difficulty about taxing the costs of the cause, as no distinct damages were given in the cause; but though they could not be taxed on the verdict, and enforced by execution, they might, it seems, be taxed on the rule of court founded on the order of reference, and be recovered by attachment, or by execution under the 1 & 2 Vict. c. 110 (*e*).

Practice as to entering verdict.

On the reference at Nisi Prius the associate or clerk of assize makes a minute on the panel of the verdict given by the jury for the specified amount of the damages subject to the award, and he makes a full note of the terms of the reference in his minute-book if there be any special terms. He detains in his own hands the Nisi Prius record until the award is made. In order to proceed to judgment and execution, the party entitled to the verdict must make the order of Nisi Prius or other submission a rule of court. On his producing the certificate or award in his favor the clerk of assize or associate will then deliver to him the Nisi Prius record, having first, in causes tried at the assizes, entered the postea on it for the amount of the sum awarded (*f*).

In strictness, it is the duty of the associate to enter the postea in all cases, but in causes in the Queen's Bench or Exchequer, tried at the sittings in London or Middlesex, the record is frequently delivered out without the postea, which is in such case entered by the attorney of the successful party (*g*). In the Common Pleas, the practice is for the associate to enter the postea in all cases (*h*).

No application to court necessary.

No application to the court is necessary to entitle the successful party (*i*), (or when the submission provides that death shall not revoke the arbitrator's authority,) the personal representative of a successful party who died before

(*d*) Taylor v. Shuttleworth, 6 Bing. N. C. 277; Tayler v. Marling, 2 M. & G. 55.

(*e*) Taylor v. Shuttleworth, 6 Bing. N. C. 277; Tayler v. Marling, 2 M. & G. 55.

(*f*) 2 Archb. Pr. 1260, 7th Ed.; Kenrick v. Phillips, 7 M. & W. 415.

(*g*) See the statement as to the practice in 1 Archb. Pr. 328, 7th Ed.

(*h*) Ex relatione of the Associate's officer.

(*i*) Borrowdale v. Hitchener, 3 B. & P. 244.

the making of the award) (*i*), to have the verdict entered pursuant to the award, or to have the postea delivered up (*k*).

Submission made rule before motion respecting verdict.

It seems the submission must be made a rule of court before the court will entertain any motion respecting the entering of the verdict (*l*).

Award of verdict conditional on decision of court.

If there be a positive award of a verdict in favor of one party, and then on the facts stated an hypothetical and conditional award of a verdict in favor of the other, in case the court should determine for the latter the point of law raised on the facts, the one for whom the award positively determines the cause need not make any application to the court, but may enter a verdict, sign judgment, and issue execution, as if there were no point of law raised (*m*). Whereas, the other party can only take advantage of the possible provision in his favor by application to the court to enter the verdict for him; and this application must be made within the time allowed for motions to set the award aside, since it is in effect a motion to set aside the positive determination of the arbitrator, and to substitute another (*n*).

We have elsewhere considered how far the courts will permit a party to have a verdict entered up for him when the arbitrator has awarded that he is entitled to the verdict, if the court decide in his favor a point of law properly raised in the award (*o*).

Rule to enter a verdict or set aside award.

A rule may be applied for in the alternative either to set aside the award, or to enter the verdict according to the opinion of the court on the facts found in the award (*p*).

Amending verdict by arbitrator's notes.

Where the arbitrator had awarded damages generally, the court on one occasion rejected an application to amend the

(*i*) Lewis v. Winter, W. W. & D. 47.

(*k*) Grimes v. Naish, 1 B. & P. 480. See Platt v. Hall, 2 M. & W. 391.

(*l*) Kirkus v. Hodgson, 8 Taunt. 733; S. C. 3 Moore, 64.

(*m*) Scott v. Van Sandau, 6 Q. B. 237; Anderson v. Fuller, 4 M. & W. 470.

(*n*) Anderson v. Fuller, 4 M. & W. 470; Paxton v. Great North of England Railway Company, reported in the notes to Riccard v. Kingdon, 3 D. & L. 773.

(*o*) See P. 2, ch. 5, s. 8. d. 5, p. 310.

(*p*) Anderson v. Fuller, 4 M. & W. 470.

entry of the verdict by entering it on such of the alleged breaches of contract as were proved according to the arbitrator's notes, holding that they could make no order respecting the notes of an arbitrator any more than of a judge (*q*).

SECTION II.

TAXING THE COSTS OF THE CAUSE.

Taxing the costs.

After giving proper notice of the taxation of costs, the attorney of the successful party should take the postea with the verdict entered upon it according to the award, as above directed (*a*), together with the rule making the submission a rule of court, and the award and the papers in the cause, to one of the Masters, who will thereupon mark the postea, and tax the costs, and sign judgment (*b*).

Of the cause.

The costs of the cause are properly taxed on the postea, as in the case of an ordinary verdict.

Of the reference.

The costs of the reference, when any are given, should strictly be taxed on the rule embodying the submission; but by consent of parties to save expense, the costs both of the cause and of the reference are frequently included in one allocatur and marked on the postea. No affidavit is required to verify the award. But if only a copy of the award were produced, and the adverse party objected to the taxation, the Master would probably decline to proceed except under the direction of the court or a judge (*c*).

Of the award.

We have before seen that generally the Master will not question the amount of the arbitrator's charges (*d*).

(*q*) Scougull v. Campbell, 1 Chitt. 283.

(*a*) See last section, p. 601.

(*b*) 2 Archb. Pr. 1261, 7th Ed.

(*c*) Ex relatione of a Master of the Court of Queen's Bench.

(*d*) See P. 2, ch. 7, s. 1, d. 1, p. 370.

How soon costs may be taxed.

On some occasions the Masters have refused to tax the costs until the time for moving to set aside the award had expired (*d*). It has, however, been lately decided that when the award is made after the return day of the distringas, the party who is successful in the cause is entitled to have his costs taxed, and to sign judgment at once (*e*).

On what scale costs to be taxed.

If the award on an action of assumpsit, debt, or covenant, (other than in cases wherein by reason of the nature of the action no writ of trial can at law be issued,) find that the plaintiff is entitled to recover in the action an amount less than £20, and there be no certificate that the cause was proper to be tried before a judge of the superior courts, the Master will tax the costs on the reduced scale, and if he tax them on the higher scale the court will order a reviewal of his taxation (*f*). Whether the reference takes place before or after issue joined the amount awarded is a sum "recovered" in the action within the meaning of the rule; for the term "recovered" is not limited to a recovery by verdict, but is used in a popular and not strictly legal sense, and means that if a party do not obtain more than £20 as the fruits of his process he is to be allowed costs according to the lower scale only (*g*).

Taxing costs of cause when no damages awarded.

Though no damages are awarded separately in the cause referred, but the arbitrator finds the issues for the plaintiff, and awards him a gross sum in respect of the cause and all other matters together, it seems the costs of the cause cannot be taxed on the verdict taken at Nisi Prius, but that they may be taxed for the plaintiff on the rule of court embodying the submission (*h*).

(*d*) Hobdell v. Miller, 2 Scott, N. R. 163; Little v. Newton, 1 M. & G. 976.

(*e*) Cromer v. Churt, 15 M. & W. 310; Little v. Newton, 1 M. & G. 976.

(*f*) Lund v. Hudson, 1 D. & L. 236; Elleman v. Williams, 2 D. & L. 46. See directions to taxing officers, E. T. 1844, and E. T. 1846; 6 Q. B. 452, in lieu of directions of Hilary vacation, 4 W. IV. 5 B. & Ad. xix.; Walther v. Mess, 7 Q. B. 189; 8 Q. B. 629.

(*g*) Elleman v. Williams, 2 D. & L. 46; Wallen v. Smith, 6 Dowl. 103.

(*h*) Taylor v. Shuttleworth, 8 Dowl. 281; Tayler v. Marling, 2 M. & G. 55.

Taxing costs according to award.

The Master must tax the costs according to the language of the award. If the arbitrator order costs to be taxed as between attorney and client, and the Master tax them on that scale, the court will not review the master's taxation on the ground that the arbitrator had no authority to give such costs. The proper application is to move to set aside the award for the excess (*i*).

Court directing how costs to be taxed.

The court on application will sometimes direct the Master how the costs are to be taxed, when there is a difficulty in construing the award as to its legal effect.

Where the costs of the cause and reference were left to the arbitrator's discretion, and were to be recovered as if costs in the cause, and the fourth issue in the cause was withdrawn by consent, but the arbitrator was to decide on the costs of the cause as if it had remained, and the award ordered the verdict to be entered on the first and second issues for the plaintiff with nominal damages, and for the defendant on the third, and did not notice the fourth; the court directed the Master to tax the costs of the first and second issues for the plaintiff, and of the third for the defendant, and to disallow to either party the costs of the fourth issue (*k*).

On the reference of an action on the case after issue joined, where the declaration contained three counts, to each of which the defendant had pleaded several pleas, going to the whole cause of action in each, the arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to certain damages on it, but that he had no cause of action in respect of the first and third counts. The Master feeling a difficulty in taxing the costs, the issues raised on the pleas not being determined by the award; the court on the application of the plaintiff, who contended that the finding on the second count in the plaintiff's favor was a substantial decision for him of the issues raised on the pleas to that count, and who expressed

(*i*) Bartle v. Musgrave, 1 Dowl. N. S. 325. See P. 2, ch. 7, s. 1, d. 3, p. 373, duty of arbitrator in awarding costs.

(*k*) Allenby v. Proudlock, 4 A. & E. 326.

his willingness to allow the defendant the costs of the issues on the pleas to the other two counts which the award had not determined, ordered the Master to tax the plaintiff his costs in the cause upon his allowing the costs of the first and third counts, and of the issues relating to them, to be taxed for the defendant (*l*).

Award ambiguous, taxation not reviewed.

An award, in assumpsit on a special count, and also on a general count, ordered the defendant to pay to the plaintiff a certain sum; the Master having taxed the costs on all the issues for the plaintiff, the court, on a motion to order a review of the taxation, discharged the rule; as on such an application the burthen lay on the applicant to show that the Master was wrong, and it was merely ambiguous whether the finding of the arbitrator applied to the special count as well as the general count, and there had been no application to set aside the award for the objection (*m*).

Taxing costs, submission rule of another court.

A cause in the Exchequer was referred, and the submission provided for its being made a rule of the Court of King's Bench, and the arbitrator awarded costs to be taxed by the Master in the Exchequer; the Court of Exchequer, though there was a suggestion of collusion between the attornies to allow excessive costs, refused to review the Master's taxation, saying that they had no jurisdiction over him, as the reference not being made by that court, he did not act as their officer in taxing the costs; but they intimated it might probably form a ground for setting aside the award in the Court of King's Bench (*n*).

Taxing costs for each of the defendants separately.

When there are two defendants in a cause referred, and the costs of the cause are to abide the event, it seems very doubtful whether there can be a separate taxation of costs for each defendant (*o*).

Costs of cause and reference separately.

When the award is in the plaintiff's favor, and the defendant has to pay the costs of the cause, and of the reference and award, the Master should make out two allocaturs,

(*l*) Williamson v. Locke, 2 D. & L. 782.

(*m*) Rennie v. Mills, 5 Bing. N. C. 249.

(*n*) Chapman v. Lansdown, 1 Anst. 273.

(*o*) Dickins v. Jarvis, 5 B. & C. 528.

one for the costs of the cause, and the other for the costs of the reference and award; for if the judgment be entered up for a less amount of costs than that specified in the allocatur, it may be set aside; and judgment cannot properly be entered up for the costs of the reference and award, but only for the costs in the cause; though if the costs of the cause and reference and award be taxed together in one allocatur, and judgment be entered up for the whole amount, it is only an irregularity, which will be cured, unless the application to set aside the judgment be made in reasonable time, or if the defendant's attorney have consented to the taxing of all the costs together (*p*).

Judgment only for costs of cause.

SECTION III.

SIGNING JUDGMENT PURSUANT TO THE AWARD.

Formerly it was sometimes held to be necessary, and sometimes not, to obtain a rule to sign judgment, before judgment could be signed or execution issued on the verdict entered pursuant to the award (*a*). But now, by a rule of all the courts, H. T. 2 W. IV. r. 67, "after the return of a writ of inquiry judgment may be signed at the expiration of four days from such return, and after a verdict or nonsuit on the day after the appearance day of the return of the distringas or habeas corpora, [i. e, the fourth day after the return,] without any rule for judgment" (*b*).

No rule for judgment requisite.

(*p*) Bignall v. Gale, 3 M. & G. 859. See ante, p. 603.

(*a*) Haywards v. Ribbans, 4 East, 309; Lee v. Lingard, 1 East, 400; Higginson v. Nesbitt, 1 B. & P. 97; Borrowdale v. Hitchener, 3 B. & P. 244; Kettle v. Grove, Barnes, 57; Read v. Garnett, Barnes, 58; Hall v. Mister, 1 Salk. 84.

(*b*) 1 Archb. Pr. 330, 7th Ed.

When judgment may be signed.

According to the old practice of the Common Pleas, when an award was made in vacation, whether before or after the return day of the habeas corpora juratorum, final judgment could not be entered up till after the first four days of the term next ensuing the date of the award, in order that the party dissatisfied therewith might have an opportunity of taking the judgment of the court upon it (*c*).

But it has recently been held in the Exchequer, that when a verdict is taken, subject to a reference at Nisi Prius, and the award, or certificate, is not made till the four days after the return day of the distringas have expired, the party in whose favor the arbitrator directs the verdict to be entered, may at once proceed to sign final judgment and issue execution, though in vacation, and need not wait until the losing party has had four days of term to move in to set aside the award (*d*). In deciding this point, the court remarked that there was a judge always sitting who would interfere and stay execution if necessary, to prevent any injustice being done.

Sum payable at a future day.

A sum being awarded due, but payment directed to be made at a future day, it seems doubtful whether a plaintiff can sign judgment before the day on which the amount is payable. It is clear he is not justified in issuing execution (*e*).

Entering up judgment nunc pro tunc.

Where the order of Nisi Prius contained the usual clause providing against the death of a party defeating the reference, and the plaintiff died before the making of the award, which directed that a verdict should be entered for the plaintiff with damages, and that the plaintiff's executors should assign an annuity to the defendant; the court made absolute a rule obtained by the plaintiff's executors to enter up judgment on the verdict, as of the term when the distringas was returnable, upon their undertaking to assign the annuity (*f*). Under a similar submission, the defendant, in

(*c*) Wilkinson v. Stewart, 59 G. III., cited by counsel in Thompson v. Jennings, 10 Moore, 110; 2 Tidd. Pr. 839, 9th Ed.

(*d*) Cromer v. Churt. 15 M. & W. 310. See Ross v. Ross, 16 L. J., Q. B. 138.

(*e*) Callard v. Paterson, 4 Taunt. 318.

(*f*) Tyler v. Jones, 3 B. & C. 144.

an action of trespass quare clausum fregit, having died before the making of the award, which directed a verdict for the defendant, and prescribed how a disputed boundary should in future run; though it was objected that the heir might be affected by an award concerning the boundary of the land, the court permitted the personal representative of the defendant to enter up judgment, nunc pro tunc, as of a previous term (*g*).

Though many terms often elapse after the reference before the award is made, it is not a matter of course to enter up judgment as of the term next after the assizes at which the verdict is found; but a special application for that purpose must be made to the court, and if the special ground alleged as the reason of the motion be answered by the affidavits on the other side, the rule will be discharged (*h*).

Judgment on lost award.

If the award be lost, the court will nevertheless permit judgment to be entered up pursuant to it on an affidavit of its contents (*i*).

What form of judgment when no verdict.

When no verdict is taken subject to the reference, and the arbitrator has no power to direct one to be entered, and the submission provides that final judgment is to be entered up for the plaintiff or defendant according to the award; if the arbitrator award that the plaintiff has no cause of action, it seems judgment ought to be entered up as on a judgment by confession (*k*).

Clause to sign judgment for amount awarded.

Where the order of reference provided that the successful party should be at liberty to sign final judgment for the *amount* which should be payable under the award, and tax his costs, and issue execution thereon for such amount, together with such costs so to be taxed; the award being in the defendant's favor, the plaintiff disputed his right under this clause to sign judgment and issue execution for his costs, for strictly speaking there was no amount payable to

(*g*) Lewis v. Winter, W. W. & D. 47.

(*h*) Brook v. Fearns, 2 Dowl. 144. See Beeston v. White, 7 Price, 209.

(*i*) Hill v. Townsend, 3 Taunt. 45.

(*k*) Harding v. Forshaw, 1 M. & W. 415, per Parke, B. 416.

him under the award; but the court, looking to the intention of the parties, and putting a liberal construction on the terms, held that the clause gave the defendant the right to sign judgment for his costs (*l*).

Judgment in ejectment as on a trial.

A judge's order, referring an action of ejectment, directed that the costs of the suit, reference, and award, should abide the event of the award, that the party in whose favor the award should be made might sign judgment in the same manner as if the cause had been tried at Nisi Prius, and that if in the plaintiff's favor, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment; it was said by the court, that if the plaintiff recovered on one only out of two demises, the defendant would be entitled to costs on the other; and though the arbitrator awarded no damages, Coleridge, J., was of opinion that in signing judgment, the plaintiff might enter it for a shilling damages, so as to warrant the judgment for costs (*m*).

Entering nominal damages to warrant judgment for costs.

Moving for judgment on an indictment referred.

On the reference at Nisi Prius of an indictment for a nuisance, if a verdict be taken for the crown, subject to the award, and the arbitrator leave the verdict untouched, and direct that the nuisance shall be discontinued, the verdict remains to secure performance of the award, and the prosecutor, in case the defendant neglects to obey the arbitrator's directions, has the choice either of proceeding by attachment, or of moving for judgment on the verdict. In case the course is adopted of calling up the defendant for judgment, the motion should be made on affidavits, stating the award, and the fact of the defendant's non-performance. The defendant should have notice of the motion, and should be furnished with copies of the affidavits on which the motion is to be made (*n*).

(*l*) Maggs v. Yorston, 6 Dowl. 481.

(*m*) Doe d. Madkins v. Horner, 8 A. & E. 235.

(*n*) R. v. Gore, 8 Dowl. 102.

SECTION IV.

ISSUING EXECUTION FOR THE AMOUNT AWARDED.

No demand requisite before execution.

Though to warrant the criminal process of attachment, personal service of the award on the party is necessary, no such step need be taken before issuing execution on the verdict for the amount awarded, as this is only civil process (*a*).

Interest on sum awarded cannot be levied.

Execution can issue only for the sum awarded. Though the day for payment of the amount be long past, there can be no additional charge for interest recoverable under this method of proceeding (*b*). If the party seek interest, he must bring an action on the award, and then he may obtain both principal and interest (*c*).

Obtaining payment out of sum deposited in court.

Where an arbitrator awarded to the plaintiff one sum in respect of the matters in the action referred, and another sum in respect of matters not in the action, the court made absolute a rule entitling the plaintiff to have paid out of court to him the amount awarded in the action, out of a larger sum deposited by the defendant in court in lieu of bail; but they refused to engraft on the rule a direction to pay over the residue to the defendant, saying that there ought for that purpose to be a separate application by the defendant, which the plaintiff should have the opportunity of answering by affidavit (*d*).

Execution against a company by mandamus.

If an award order a public officer of a company (in whose name the company by statute are to sue and be sued, but who is exempted from personal liability) to pay money or costs in respect of an action referred; if the act give no

(*a*) Borrowdale v. Hitchener, 3 B. & P. 244, overruling Read v. Garnett, Barnes, 58.

(*b*) Lee v. Lingard, 1 East, 400.

(*c*) Churcher v. Stringer, 2 B. & Ad. 777.

(*d*) Fowle v. Steinkeller, 9 Dowl. 1037.

power of taking out execution against the goods of the company, and no other mode exist of enforcing payment, a mandamus will lie to the treasurer and directors, commanding them to pay the sum awarded (*e*).

(*e*) R. v. St. Katherine's Dock Company, 4 B. & Ad. 360.

CHAPTER IX.

SETTING ASIDE AN AWARD ON MOTION.

Scope and contents of the ninth chapter.

HAVING fully discussed the various modes of enforcing valid awards, we have now to see how a party may obtain relief at law against one that is void or defective. In the chapter treating of an award as a ground of action or defence, it has been shown how the award relied on in an action may be impeached by pleading (*a*) or evidence (*b*). But a party who believes that an award made against him is open to objection, frequently desires to take the initiative, and have it avoided at once. This, if his objections be well founded, he may in general effect by the summary method pointed out in this chapter—of making a motion in court to set aside the award.

On what references the courts of law have jurisdiction to entertain the motion,—within what period after the award has been published the motion must be made,—and for what causes the courts will set the award aside, are respectively set forth in the three first sections.

The four succeeding sections treat of—the practical steps to be taken on making the application—the rule to show cause,—the answer that may be given by the party supporting the award,—and the result of the motion.

(*a*) See P. 3, ch. 3, s. 4, p. 505. (*b*) See P. 3, ch. 3, s. 5, p. 514.

The eighth and last section is occupied with considering the course which is sometimes allowable,—of referring the award back to the arbitrator.

SECTION I.

THE JURISDICTION OF THE COURTS TO SET AN AWARD ASIDE ON MOTION.

When submission by rule of court.

It is only when the submission is by rule of court, or can be made a rule of court, that the courts have any jurisdiction to set aside an award on motion (*a*). When the submission was by agreement out of court, the courts of common law had no authority to set aside an award until the statute 9 & 10 Will. III. c. 15.

For misbehaviour of the arbitrator, the only remedy was by bill in equity, since it could not be pleaded as a defence to an action on the award; and in such a case a bill in equity still remains the only means of relief, when the submission, if made out of court, does not fall within the operation of the above-mentioned act of parliament (*b*).

Stat. 9 & 10 W. III. c. 15.

That statute provides in effect that in all cases where the submission contains an agreement for making it a rule of any of the superior courts of record, (among which the Court of Chancery is reckoned,) the award, if procured by corruption or undue means, shall be set aside on complaint made within a limited time to the court of which the submission is agreed to be made a rule (*c*).

Motion in court.

The jurisdiction to set aside an award, whether at com-

(*a*) Mitchell v. Staveley, 16 East, 58.

(*b*) Veale v. Warner, 1 Saund. 327, c. notes.

(*c*) Dawson v. Sadler, 1 S. & S. 537. See P. 1, ch. 3, s. 3, p. 57.

mon law or under the statute, can alone be exercised on motion made for that purpose openly in the court of which the submission has been made a rule; for a judge at chambers has no power to set aside an award, though in vacation he can stay all proceedings under the award till the next term, in order to allow time for an application to avoid it to be made to the court (*d*).

Not before a judge at chambers.

An award made pursuant to an order of reference on the trial at the Lancaster assizes of a cause in the Common Pleas at Lancaster, cannot be impeached on motion in the courts at Westminster, for they do not acquire any jurisdiction for this purpose under the 4 & 5 W. IV. c. 62, s. 26, which empowers the superior courts at Westminster, after *trials* of actions in the Common Pleas at Lancaster, to grant new trials or enter verdicts or nonsuits.

Court of Common Pleas at Lancaster.

But in this particular case the application may be made to any judge at chambers, all of the judges being appointed judges of the Common Pleas of Lancaster, under sect. 24 of the act (*e*).

SECTION II.

WITHIN WHAT PERIOD THE MOTION TO SET ASIDE AN AWARD MUST BE MADE.

Time for setting aside award under the statute.

1. *When award under the statute of William III.*]— It is enacted by the 9 & 10 W. III. c. 15, s. 2, that awards procured by corruption or undue means, shall be adjudged to be void, and be set aside, provided "complaint of such corruption or undue practice be made in the court where the

(*d*) Cromer v. Churt, 15 M. & W. 310.

(*e*) Byrne v. Fitzhugh, 5 Tyrw. 221.

rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties."

If an award be made in vacation, the motion to set it aside must be made before the last day of the ensuing term. If it be made in term time, the party has the remaining portion of that term, and until the last day of the following term, to make his application. Formerly it was held that an award made between the essoign day of Trinity Term and the commencement of the full term, was to be held as made in Trinity Term, and that therefore an application to set it aside made in Michaelmas Term, was within the time limited by the statute (*a*). But since the recent act of 11 G. IV. 1 W. IV. c. 70, s. 6, which directs that each term shall commence on a particular day, as the three days previous to the first day of full term cannot any longer be considered as part of the following term, but as belonging to the previous vacation (*b*), if an award be now made within them, the motion must be made in the term immediately commencing.

Limit applies whatever the ground of motion.

At one time it was argued that a party need not apply to set aside the award until some step was taken to enforce it, but Lord Mansfield held the words of the statute were too plain to allow of such a construction (*c*). At another time it was contended that the limitation of the statute only applied to cases where the award was impeached for corruption or undue practice, and that the award might be set aside at any time for objections manifest on the face of the instrument; but the courts have clearly laid it down that the limitation given by the statute applies to all objections, intrinsic as well as extrinsic, and that an award, however defective on its face, cannot be set aside on any grounds after the time allotted by the act. If, however, any attempt be made to enforce an award by attachment, the application

(*a*) Burt, In re, 5 B. & C. 668.
(*b*) Price v. Hughes, 1 Dowl. 448.
(*c*) Freame v. Pinneger, 1 Cowp. 23.

may be resisted at any time, however late, for defects appearing on the face of the award itself (*d*).

Publication to the parties, notice of award made.

The statute of William III. (*e*) provides that the time for setting aside an award shall begin to run after the award is made "*and published to the parties.*"

The limited period, therefore, is not necessarily to be computed from the making of the award, but from the publication of it to the parties.

An award is ordinarily said to be published, as soon as it has been executed by the arbitrator and announced as his final determination, so that he no longer retains any power of alteration, and the instrument is complete as an award (*f*). But the publishing in this sense is not the publishing required by the statute, which demands a publishing *to the parties.* There is no publishing to the parties until they have notice that the award has been made (*g*). This notice is sufficient; and the time will run from the date of such notice, although it be not until long after that the party has intimation of the contents of the award, or is served with a copy of it (*h*).

Notice of award to be had on payment of excessive fee.

As in cases of references not under the statute the courts commence the computation of the period allowed for setting aside the award from the publication to the parties by analogy to the statute (*i*), the following points decided on this head on submissions by common law may conveniently be noticed here. In a case in the Common Pleas it was laid down that an award was to be considered as published to the parties, when the parties had notice that it was ready for delivery on payment of the reasonable charges; and that when the arbitrator gave notice that the award was ready, but refused to deliver it except on payment of an alleged

(*d*) Pedley v. Goddard, 7 T. R. 73; Lowndes v. Lowndes, 1 East, 276; Zachary v. Shepherd, 2 T. R. 781; Auriol v. Smith, 1 Turn. & R. 121; Dubois v. Medlycott, Barnes, 55; Stephenson v. Browning, Barnes, 56.

(*e*) 9 & 10 W. III. c. 15.

(*f*) Brooke v. Mitchell, 6 M. & W. 473.

(*g*) Brooke v. Mitchell, 6 M. & W. 473; Potter v. Newman, 4 Dowl. 504.

(*h*) Hemsworth v. Brian, 7 M. & G. 1009.

(*i*) Potter v. Newman, 4 Dowl. 504.

excessive charge, the court held that the award was not published until the arbitrator's charge had been taxed by the officer of the court (*k*).

But, in a subsequent case, the Court of Queen's Bench expressed their dissent from the above decision, and held that an award was published, when the arbitrator gave notice that the award was ready to be delivered on payment of his charges, whether those charges were reasonable or not (*l*).

And in this view the Court of Exchequer concur, on the ground that it leads to less dispute afterwards; whereas the rule in *Musselbrook* v. *Dunkin* (*m*), would make the time for moving to set aside the award depend upon the variable time when the Master might make his report as to the reasonableness of the charges (*n*).

In a more recent case the Court of Common Pleas seem to have held that an award was published by a notice that it was ready for delivery on payment of a specified sum for the arbitrator's charges, although it was suggested that that sum was excessive; for when the plaintiff moved to set aside the award which had been taken up by the defendant, and alleged as an excuse for not applying within the proper time after this notice of the award being ready for delivery, that the fee demanded by the arbitrator was extortionate, and that therefore he had not taken up the award; the court expressed a very decided opinion against the validity of the excuse, the party not having applied to the court to have the arbitrator's charges taxed by the Master (*o*).

Whether court can give further time for moving.

Whether the courts have a discretionary power of allowing further time than the statute prescribes for the application may be doubted.

It is true that where one of the parties improperly kept the submission, and thus, it was contended, prevented it being made a rule of court within the term following the making of the award, and rendered it impossible for the other party to

(*k*) Musselbrook v. Dunkin, 9 Bing. 605.

(*l*) Macarthur v. Campbell, 5 B. & Ad. 518.

(*m*) 9 Bing. 605.

(*n*) Brooke v. Mitchell, 6 M. & W. 473.

(*o*) Moore v. Darley, 1 C. B. 445.

apply to set aside the award within the statutable time; Williams, J., on a motion for an enlargement on these grounds, made on the last day but one of the term, granted the party permission to move to set aside the award in the following term, and directed, that, if a rule nisi should then be granted, it should be dated as of the preceding term (*p*).

But the propriety of the above decision has been questioned by Coleridge, J., on several occasions. That learned judge remarking, that the application in *Perring & Keymer, In re* (*q*), was ex parte, under a somewhat similar state of facts, came to a contrary decision; expressing strong doubts of the power of the courts to antedate the rule, and saying that he had no idea that the courts could dispense with the provisions of an Act of Parliament, though they might dispense with their own rules (*r*).

On a more recent occasion, where a party on the last day but one of the term next after the award was made, asked leave to be allowed to move on the last day of term to set aside the award, on the ground that the affidavit on which the motion was intended to be grounded had not arrived from the country, Maule, J., refused the motion, saying, that to allow it would be to repeal the Act (*s*).

Drawing up rule embodying submission nunc pro tunc.

A subsequent decision in the Queen's Bench is apparently confirmatory of the above ruling. A rule nisi was obtained on the last day but one of term to set aside an award under the statute made in the previous vacation; the submission was not made a rule till after the term had expired; on an application in the following term to allow the rule embodying the submission to be drawn up as of the day on which the motion was made, and to enlarge the rule nisi then obtained, and to allow it to be drawn up on reading the rule founded on the submission so drawn up as prayed for, Erle, J., refused the motion, saying that the statute was precise in its terms, and that as the motion before the submis-

(*p*) Perring & Keymer, In re, 3 Dowl. 98.
(*q*) 3 Dowl. 93.
(*r*) Smith & Blake, In re, 8 Dowl. 133; S. C. 2 Jur. 1015; Reynolds v. Askew, 5 Dowl. 682.
(*s*) Evans v. Howell, In re, 4 M. & G. 767.

sion was made a rule could not be attended to by the court, and the time limited by the statute had expired, the party was precluded from moving for another rule to set the award aside. It appeared that the party moving had no copy of the submission, which was in the hands of the opposite party, who refused to make it a rule of court in time; but no application had been made to the court to compel the latter to produce it for the purpose of having it made a rule (*t*).

Still more recently, however, the same learned judge has drawn an important distinction. On the last day but one of the term next after the making of the award, a party obtained a rule nisi for the other party to file the submission with the Master, in order to its being made a rule of court as of the day on which the motion to set aside the award was made; and that the rule to set aside the award should be drawn up on reading such rule. The party applying had good ground for supposing that the other side, in whose hands the submission was, intended to make it a rule of court, and it was only by an accident that that result did not take place. Erle, J., making the latter rule absolute, observed, "The party has, within the time limited by the statute, applied to set aside the award, and also to make the submission a rule of court as of the same day on which the motion was to be made. The distinction between the present case and those which have been cited I take to be this: that here the party applying to set aside the award did take the initiative within the time limited by the statute, and that he was not able to make the submission a rule of court by reason of its being in the hands of the other party, whereas in the cases which have been referred to the motion itself was made after the time limited by the statute. If there had been no reason for supposing that the submission would have been made a rule of court, so as to enable the party to move to set it aside within the limited time, I think a different answer must have been given to this motion" (*u*).

(*t*) Ross v. Ross, 16 L. J., Q. B., 138; S. C. 4 D. & L. 648.

(*u*) Midland Railway Company v. Heming, 4 D. & L. 788; S. C. 11 Jur. 658.

Extending time in Equity.

In Equity, in a recent instance, the Master of the Rolls in effect extended the time beyond the term allowed by the statute. A motion for a proceeding to carry an award into execution was made on the last day of the next term after the making of the award. The order asked for was then resisted by the counsel for the opposite party, who stated in court that he had objections to make to the award, and requested that an opportunity might be given for making a regular and formal application to set it aside. The Master of the Rolls directed the original motion to stand over till the first day of the following term, and gave the party objecting liberty then to dispute the award. On the hearing, in the next term, though it was contended that it was then too late to raise objections to the award, and that the time could not be extended, the Master of the Rolls allowed them to be raised, and ultimately set the award aside on account of the irregular conduct of the arbitrator (*x*).

We have previously seen that the reference of a cause by agreement out of court is a reference under the statute, and not at common law: and therefore the motion to set aside the award must without fail be made within the time given by the statute (*y*).

Limitation of time for moving at common law.

II. *When award in a cause at common law.*]—The reference of a cause by an order of a judge, or an order of Nisi Prius, or by a rule of court, is not a reference under the statute, but by the common law power of the court, and the statutable limitation of time does not necessarily apply (*z*): and it will be seen that the same limit does not attach in all cases.

When verdict taken on reference of cause only.

When a verdict is taken at Nisi Prius, subject to a reference, and the "cause only," or (what is the same thing) "all matters in difference in the cause," are referred, and the arbi-

(*x*) Harvey v. Shelton, 7 Beav. 455.

(*y*) Rushworth v. Barron, 3 Dowl. 317; Reynolds v. Askew, 5 Dowl. 682.

(*z*) Anderson v. Coxeter, 1 Stra. 301; Potter v. Newman, 4 Dowl. 504.

trator is put merely into the place of the jury, his award is looked upon as a verdict, and a motion to set aside the award must in ordinary cases be made within the time limited for a motion in arrest of judgment or for a new trial, namely, within the first four days of term which occur next after the publication of the award (*a*). Hence, if an award be made and published to the parties in vacation, the application must generally be made within the first four days of the following term; if in the middle of term, within the four succeeding days of the same term.

The rule equally applies whether the arbitrator has to decide on the question who is entitled to the verdict, or whether he has only to ascertain the amount of the plaintiff's damages (*b*). But it does not appear to have been of universal acceptance for any very long period, for Littledale, J., on one occasion remarked that it did not exist until many years after he had been called to the bar (*c*).

When verdict taken on reference of cause and all matters.

If a verdict be taken, subject to a reference, not only of the cause, *but of all matters in difference* as well, then, as the award cannot be considered merely in the light of a verdict, since the reference contemplates the decision of matters beyond those in the cause, the analogy, on which the previous rule of applying within the first four days of term subsequent to the award is founded, fails, and the courts in the exercise of their discretion have adopted a different limit, namely, that fixed by the statute of William III. (*d*).

It is true, that in one instance of a reference at Nisi Prius of a cause and all matters in difference, Lord Tenterden, C. J., expressed his opinion that the application should properly be made within the time for a motion for a new trial; but that observation was extra-judicial and unnecessary for disposing

(*a*) Riccard v. Kingdon, 3 D. & L. 773; Paxton v. Great North of England Railway Company, reported in Riccard v. Kingdon, 3 D. & L. 773; Thompson v. Jennings, 10 Moore, 110; Borrowdale v. Hitchener, 3 B. & P. 244.

(*b*) Thompson v. Jennings, 10 Moore, 110.

(*c*) Martin v. Burge, 6 N. & M. 201; S. C. 4 A. & E. 973; Allenby v. Proudlock, 4 Dowl. 54.

(*d*) Allenby v. Proudlock, 4 Dowl. 54; Paxton v. Great North of England Railway Company, reported in the notes to Riccard v. Kingdon, 3 D. & L. 773; Hayward v. Phillips, 6 A. & E. 119.

of the case before him (*e*); and Littledale, J., in a subsequent case refused to act upon it (*f*). On a reference of a cause and all matters in difference, the Court of Common Pleas discharged a rule for setting aside an award on the ground that the rule had been moved for after the first four days of term; but the distinction between the reference of a cause and a cause and all matters in difference was not adverted to in the argument or judgment (*g*). In like manner, the Court of Exchequer in one instance held the application to set aside an award made in the preceding term on a reference at Nisi Prius of a cause and all matters in difference to be too late (*h*). With respect to this case, Coleridge, J., said that the report was so short that it was difficult to say on what principle the decision went, and that it seemed probable the attention of the court was not directed to the point in question (*i*).

These cases, however, so far as they are really inconsistent with the rule adopted from analogy to the statute, may be considered as deliberately overruled, for that limit of time has been fixed after full consideration of all the decisions.

Submission, not award fixes limit.

It is the submission and not the award that decides the limit, for where by the order of Nisi Prius all matters in difference were referred with the cause, the application to set aside the award was permitted to be made after the four first days of term, although the arbitrator stated in his award that neither party had any claim against the other in respect of matters in difference out of the cause (*k*).

Reference of cause or of cause and all matters, when no verdict taken.

As the award cannot be considered as a verdict, when the cause, though alone, is referred at a stage earlier than the trial at Nisi Prius by judge's order, or rule of court, the discretionary limit for setting aside the award in such cases is the period given by the statute; and of course the limit is

(*e*) Rawsthorn v. Arnold, 6 B. & C. 629.
(*f*) Martin v. Burge, 4 A. & E. 973; S. C. 6 N. & M. 201.
(*g*) Lyng v. Sutton, 5 Dowl. 39.
(*h*) Sell v. Carter, 2 Dowl. 245.
(*i*) Allenby v. Proudlock, 4 Dowl. 54.
(*k*) Moore v. Butlin, 7 A. & E. 595.

the same when matters beyond the cause are referred in addition (*l*).

Time for moving to enter verdict pursuant to point stated in award.

When the award directs the verdict for the plaintiff to stand, subject to the opinion of the court, a motion to enter a verdict for the defendant pursuant to a point raised on the award, (whether the arbitrator be or be not specially empowered to raise questions,) must be made within the same time as a motion to set aside the award; for the arbitrator having expressly decided for the plaintiff, the application is in fact an application to set aside his award; and both terms may be included in one rule; either to set aside the award or to enter the verdict according to the opinion of the court on the facts found (*m*).

Discretionary to allow further time to move.

III. *When further time allowed on awards at common law.*]—In all cases of references by common law, whether the prescribed limit be that adopted from analogy to a verdict, or that founded on analogy to the statute, the courts in the exercise of their discretion will, on sufficient grounds being shown to them, allow a further period for making the application to set aside the award (*n*). Thus, where an award was made on a reference of a cause at Nisi Prius, the court, on a statement of facts showing it was impossible for the attorney to prepare a case and get counsel's opinion on the validity of the award within the four first days of term, on application for that purpose made on the second day of term, enlarged the time for making the motion to a day later than the fourth day of term (*o*).

When no time to get counsel's opinion.

(*l*) Allenby v. Proudlock, 4 Dowl. 54; Synge v. Jervoise, 8 East, 465; Rogers v. Dallimore, 6 Taunt. 111; Potter v. Newman, 4 Dowl. 504.

(*m*) Paxton v. Great North of England Railway Company, reported in Riccard v. Kingdon, notes, 3 D. & L. 773; Anderson v. Fuller, 4 M. & W. 470.

(*n*) Allenby v. Proudlock, 4 Dowl. 54; Paxton v. Great North of England Railway Company, reported in the notes to Riccard v. Kingdon, 3 D. & L. 773; Rogers v. Dallimore, 6 Taunt. 111; Synge v. Jervoise, 8 East, 465; Hemsworth v. Brian, 7 M. & G. 1009; Worrall v. Deane, 2 Dowl. 261.

(*o*) Bennett v. Skardon, 5 M. & R. 10.

In a late case, on a reference by judge's order of a cause and all matters in difference, where the defendant, in whose favor the award was, improperly kept the order of reference from the plaintiff and prevented its being made a rule of court till too late, Patteson, J., granted a rule giving the plaintiff an additional term to move to set aside the award, and directed that the rule to set aside the award, if granted, should bear date on the day of the application for the enlargement. The motion for leave to move (being made in Easter Term) asked leave to move in Trinity Term, but the argument on that rule not coming on until Michaelmas Term, it having been enlarged by consent, it was urged that the court would not make absolute a rule which could have no effect when granted, as Trinity Term had elapsed; but the court intimated that they thought they had power to mould the rule accordingly, as it had stood over by consent; and the rule was ultimately drawn up allowing the party to make his motion to set aside the award in the Michaelmas Term then instant (*p*).

Party keeping back order of reference.

Where a whole term had elapsed after an award made on a submission by a judge's order, the court entertained the motion in the second term, and set aside the award, the merits being clear, and the counsel having been instructed to move earlier, but having for some cause failed to do so (*q*).

Counsel failing to move in time.

Where the rule to set aside the award was enlarged by consent to beyond the limited period, and then ultimately discharged on a preliminary technical objection, Patteson, J., being of opinion that had the rule not been so enlarged, but disposed of on the same ground within the first term, the party might within that term have moved again, thought this a sufficient reason for allowing a second application as soon as the first rule was discharged (*r*).

First rule discharged on technical grounds.

But a party who would take the case out of the ordinary rule must show clearly to the court why the application is

Stating excuse for the delay.

(*p*) Bottomley v. Buckley, 4 D. & L. 157.

(*q*) Rogers v. Dallimore, 6 Taunt. 111.

(*r*) Sherry v. Oke, 3 Dowl. 349.

made too late. Hence, if after the usual period information be obtained of facts which afford grounds of impeaching the award, the rule will be refused, unless the party positively allege that he did not know of the circumstances on which he relies in time (*s*). It is no sufficient reason for delay on the part of the plaintiff, that he failed to move in time, as the defendant had misled him, by stating that he, the defendant, intended to move to set the award aside; for the plaintiff ought not to have relied on the defendant but to have proceeded himself (*t*).

Party misled by opponent.

Arbitrator demanding excessive fee.

The cases which have been previously cited as showing that an award is to be considered as published to the parties, although it can only be had on payment to the arbitrator of an extortionate fee, prove also, that the fact of the party on that ground having delayed to take up the award, and so remaining ignorant of its contents, is an insufficient excuse for not applying to set aside the award in time. If, however, the party had had the arbitrator's charges taxed, and had demanded the award, tendering the sum found reasonable by the Master, the court perhaps would have granted some indulgence if the arbitrator's continued refusal to deliver the award had obstructed the party's moving in due course (*u*).

Recent appointment of assignee.

Where an arbitrator makes an award after one of the parties becomes insolvent, and the assignee is not appointed until two terms have expired, the court, it seems, will not hear him, although he moves to set aside the award immediately on his appointment (*x*). So the circumstance that a fiat in bankruptcy has issued against the plaintiff is no reason for extending the time (*y*).

Issuing of fiat in bankruptcy.

(*s*) Reynolds v. Askew, 5 Dowl. 682.

(*t*) Emet v. Ogden, 7 Bing. 258.

(*u*) Macarthur v. Campbell, 5 B. & Ad. 518; Moore v. Darley, 1 C. B. 445; Musselbrook v. Dunkin, 9 Bing. 605.

(*x*) Hobbs v. Ferrars, 8 Dowl. 779.

(*y*) Hemsworth v. Brian, 7 M. & G. 1009.

SECTION III.

FOR WHAT CAUSES AN AWARD MAY BE SET ASIDE ON MOTION.

1. *Where the conduct of the arbitrator corrupt or irregular.*]—We may remark as a general rule that every ground of relief in equity against an award is equally open in the courts of common law on motion in a summary way to set the award aside (*a*).

All equitable grounds available.

In every court of law or equity the award will be set aside on motion, if it be proved that the arbitrator is corrupt or partial (*b*), or that he is secretly interested in the subject referred (*c*).

Corruption or partiality of arbitrator.

There may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imputing the slightest improper motives to the arbitrator (*d*). Thus the award will be set aside, if the arbitrator refuse to postpone a meeting for the purpose of allowing a party time to get counsel on his part, where the other side unexpectedly appears by counsel (*e*); so if he receive affidavits instead of vivâ voce evidence, when he is directed to examine the witnesses on oath (*f*); but not if he omit to swear the witnesses, and the party at the meeting do not request him to administer the oath, or after objecting, subsequently acquiesce in the mode of examination (*g*).

Legal misconduct of arbitrator.

Refusing time to get counsel.

Omitting to swear witnesses.

The award may be impeached if the arbitrator make his award without having heard all the evidence (*h*), or having

Not hearing case.

(*a*) R. v. Wheeler, 3 Burr. 1257; Lingood v. Eade, 2 Atk. 501.

(*b*) Tittenson v. Peat, 3 Atk. 529; Morgan v. Mather, 2 Ves. Jr. 15.

(*c*) Earle v. Stocker, 2 Vern. 251.

(*d*) Phipps v. Ingram, 3 Dowl. 669.

(*e*) Whatley v. Morland, 2 Dowl. 249. See P. 2, ch. 4, s. 1, d. 2, p. 168.

(*f*) Banks v. Banks, 1 Gale, 46.

(*g*) Ridoat v. Pye, 1 B. & P. 91. See P. 2, ch. 4, s. 1 d. 5, p. 176.

(*h*) Phipps v. Ingram, 3 Dowl. 669.

allowed the party reasonable opportunity of proving his whole case (*i*). So, also, if contrary to the principles of natural justice he examine a witness or a party privately or in the absence of his opponent; unless the irregularity be subsequently waived by the parties (*k*).

Examining witness, party absent.

Proceeding ex parte improperly.

If the arbitrator proceed ex parte without sufficient cause, or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided (*l*).

Refusing to consider a matter in difference.

So, likewise, if he refuse to hear evidence on a claim within scope of the reference, on a mistaken supposition that it is not within it (*m*); but not if he erroneously reject admissible or receive inadmissible evidence (*n*). His refusing to hear additional evidence tendered, when the whole case is referred back to him by the court, is fatal (*o*), but not so, when the award is sent back with a view to a particular amendment only being made (*p*).

One of several arbitrators using false case and opinion.

When there are several arbitrators, if one of them take counsel's opinion on an incorrect statement of the facts, and knowingly act upon it, the award will be set aside, but not if he take an opinion on a case truly drawn up (*q*). So if one delegate his authority of deciding a point of law to another absolutely (*r*), but not if he merely give up his own opinion to the other (*s*). Even when the submission provides, that an award made by any two out of the three arbitrators shall be valid, if two of them hold meetings alone, without notice to the third, the award may be impeached; but not if after notice the latter stay away (*t*); so it will be bad if the two

Delegating authority to one another.

Two of three arbitrators acting alone.

(*i*) Pepper v. Gorham, 4 Moore, 148. See P. 2, ch. 4, s. 1, d. 6, p. 178.

(*k*) Dobson v. Groves, 6 Q. B. 637; Harvey v. Shelton, 7 Beav. 455. See P. 2, ch. 4, s. 1, dd. 9, 10, pp. 185, 189.

(*l*) Gladwin v. Chilcote, 9 Dowl. 550. See P. 2, ch. 4, s. 1, d. 11, p. 191.

(*m*) Samuel v. Cooper, 2 A. & E. 752.

(*n*) Hagger v. Baker, 14 M. & W. 9. See P. 2, ch. 4, s. 1, d. 12, p. 193.

(*o*) Nickalls v. Warren, 6 Q. B. 615.

(*p*) Howett v. Clements, 1 C. B. 128. See P. 2, ch. 4, s. 1, d. 16, p. 198.

(*q*) Hare, In re, 6 Bing. N. C. 158. See P. 2, ch. 4, s. 2, d. 3, p. 204.

(*r*) Little v. Newton, 9 Dowl. 437.

(*s*) Eardley v. Steer, 4 Dowl. 423. See P. 2, ch. 4, s. 3, d. 1, p. 208.

(*t*) Dalling v. Matchett, Willes, 215.

exclude the third from the meetings by force or fraud, or make an award without first taking his opinion (*u*).

Arbitrators appointing umpire by lot.

An umpirage, or award of an umpire, may be set aside, if the two arbitrators appoint the former by lot and not by choice (*x*), unless the parties have consented to that mode of appointment, or after knowledge of it have waived any objection (*y*). So also, if the umpire make his award, refusing to rehear the evidence, his decision will be set aside; but the award will be sustained, if the parties, by the submission, or by their conduct, have agreed to relieve him from the duty of re-examining the witnesses (*z*).

Umpire not rehearing case.

II. *When the award a mistaken decision in law or fact.*] —An award, good on its face, cannot be set aside for an erroneous judgment of the arbitrator on a question of law; nor will the court review his decision as to the facts, or allow the merits of the case to be gone into (*a*): although in very early times the Court of Chancery took upon itself to examine the propriety of the arbitrator's decision as to the amount of damages, and set aside the award where the damages awarded were deemed excessive (*b*).

Erroneous judgment of arbitrator.

The court will not set aside an award, on a suggestion that the arbitrator has allowed in account premiums of insurance on an illegal voyage to a hostile port, the legality of the ground of the insurance being for the consideration of the arbitrator (*c*).

Arbitrator deciding legality of a contract.

When the arbitrator has made a mere mistake in the computation of the amount awarded, intending to give a different

Whether award set

(*u*) Templeman & Reed, In re, 9 Dowl. 962. See P. 2, ch. 4, s. 3, d. 3, p. 211.

(*x*) Cassell, In re, 9 B. & C. 624.

(*y*) Tunno & Bird, In re, 5 B. & Ad. 488. See P. 2, ch. 4, s. 4, d. 3, p. 220.

(*z*) Salkeld & Slater, In re, 12 A. & E. 767. See P. 2, ch. 4, s. 4, d. 5, p. 230.

(*a*) Lancaster v. Hemington, 4 A. & E. 345. See P. 2, ch. 5, s. 8, d. 1, p. 295.

(*b*) Cooper v. ——, 3 Rep. in Chanc. 42, 76, A. D. 1672; S. C. 2 Vern. 251; 1 Eq. Cas. Ab. 49; Younge v. Cooke, 3 Rep. in Chanc. 45, 82; Brown v. Brown, 1 Vern. 157, A. D. 1683.

(*c*) Wohlenberg v. Lageman, 6 Taunt. 250.

sum than that set down in the award, the present inclination of the courts of law is to hold that the award cannot on that account be set aside. The question how far an award is impeachable for a mistake, either apparent on the face of the instrument or not, whether made out by extrinsic statements of the arbitrator, or raised purposely in his award for the opinion of the courts, has been already discussed at length (*d*).

aside for mere mistake of arbitrator.

There do not seem to have been any recent decisions in equity respecting the effect of a mistake on the award, so as to enable one to pronounce, how far the modern decisions of the common law courts on this head will meet with the sanction and adoption of the equity judges.

It is, however, desirable that an uniformity of practice and principle should prevail in all the courts on subjects, which in every court are to be decided on equitable grounds, and not on any technical rules of legal construction.

Void award when set aside.

III. *When the award is a nullity.*]—If the award be altogether void, and can be considered a nullity, and nothing can be done upon it but by suit, as where the arbitrator's authority has been revoked, the court will not usually interfere to set it aside, because any suit brought to enforce it must fail. But there is an exception, where something may be done under the award, which renders the interference of the court necessary; for instance, when the award orders a verdict to be entered, the court will set it aside, though the submission had been revoked; since if the award be allowed to stand, the party would be entitled to judgment, and might issue execution (*e*).

Award made after

An award made after the time for making it has expired, will often be set aside (*f*), unless the conduct of the parties

(*d*) Phillips v. Evans, 12 M. & W. 309. See P. 2, ch. 5, s. 8, p. 295.

(*e*) Doe d. Turnbull v. Brown, 5 B. & C. 384; Hobbs v. Ferrars, 8 Dowl. 779; Worrall v. Deane, 2 Dowl. 263.

(*f*) Swinford & Horn, In re, 6 M. & S. 226. See P. 2, ch. 3, s. 1, d. 2, p. 132.

have amounted to an enlargement of the period (*g*); so also, as just noticed, will an award made after the submission has been revoked, either by the will of the party, or by his death (*h*).

time expired. Or revocation.

The want of a proper stamp is no ground for setting aside an award, when no steps have been taken to enforce it (*i*).

Improper stamp.

Nor can it be attacked for the want of a recital to show that the arbitrator has jurisdiction (*k*), or for a false recital (*l*).

Deficient recital.

IV. *When the award is not final.*]—When the award is not final, it will be set aside. If, without special power, the arbitrator make two awards, each deciding part of the matters referred, and not one entire award on all together, both may be set aside, for there is no one final award on all the subjects (*m*). So also if the award fail to decide on all the matters referred for determination (*n*), whether the omission appear on the face of the award, or be shown to the court by affidavit; but it will not be set aside, if the question undecided were not notified to the arbitrator as a matter in difference, or the parties showed by their conduct that they did not mean him to decide it (*o*). So it will be avoided, if it reserve a point for the future decision of the arbitrator, or delegate the determination of it to another (*p*); but no objection attaches to delegating to the Master the taxing of costs, or appointing a stranger to perform a mere ministerial duty (*q*).

Two awards, each deciding part, no final award.

Award omitting to decide all matters.

Reserving or delegating decision.

It will also be set aside as not being final, if it dispose of

Not deciding the cause,

(*g*) Hallett v. Hallett, 7 Dowl. 389. See P. 2, ch. 3, s. 2, d. 2, p. 141.

(*h*) Clapham v. Higham, 1 Bing. 87; Potts v. Ward, 1 Marsh. 366. See P. 2, ch. 3, s. 3, d. 8, p. 162.

(*i*) Preston v. Eastwood, 7 T. R. 95.

(*k*) George v. Lousley, 8 East, 12. See P. 2, ch. 5, s. 2, p. 245.

(*l*) Trew v. Burton, 1 C. & M. 533. See P. 2, ch. 5, s. 2, p. 245.

(*m*) Winter v. Munton, 2 Moore, 723. See P. 2, ch. 5, s. 3, p. 249.

(*n*) Samuel v. Cooper, 2 A. & E. 752. See P. 2, ch. 5, s. 4, p. 250.

(*o*) Rees v. Waters, 16 M. & W. 263. See P. 2, ch. 5, s. 4, d. 1, p. 251.

(*p*) Tandy v. Tandy, 9 Dowl. 1044.

(*q*) Pedley v. Goddard, 7 T. R. 73. See P. 2, ch. 5, s. 4, dd. 10, 11, pp. 271, 274.

a cause referred merely by directing a nonsuit (*r*); or when it ought, for the purposes of costs, to show in whose favor the cause is decided, if it award merely that the proceedings in the cause are to cease (*s*); or if it fail to decide every issue joined in the cause (*t*). But a party in whose favor a mistake is made cannot avail himself of it to set aside the award. Thus a defendant cannot urge that the arbitrator has improperly divided a plea of set-off, awarding part of the issue raised on that plea in his favor, and part for the plaintiff; whereas the whole issue ought to have been found for the latter (*u*).

On all the issues properly.

Mistake in favor of party moving.

Directing unauthorized entry of verdict.

The award will be set aside in the Court of Queen's Bench, (but not in the Exchequer,) if it decide a cause only by an unauthorized direction that a verdict should be entered (*x*). If it omit to award damages on the issues found for the plaintiff (*y*) it may be impeached, but not if there be an issue found for the defendant on a plea covering the whole cause of action (*z*). It may be assailed for omitting to assess damages on a new assignment, on which the plaintiff has signed judgment for want of a plea (*a*); and probably in many cases for not assessing contingent damages on a demurrer (*b*).

Omitting to assess damages properly.

Not finding balance of defendant's set-off.

When all matters in difference, as well as the cause, are referred, and the arbitrator finds for the defendant on the general issue in debt, the award may be set aside for failing further to ascertain the amount of the defendant's set-off (*c*).

Directing unwarranted entry of judgment.

Deciding a cause by an unwarranted direction that a judgment be entered, is a sufficient ground of motion; but not if the award also show by other provisions how the cause has

(*r*) Wild v. Holt, 9 M. & W. 161.

(*s*) Hunt v. Hunt, 5 Dowl. 442. See P. 2, ch. 6, s. 2, d. 1, p. 339.

(*t*) Kilburn v. Kilburn, 13 M. & W. 671. See P. 2, ch. 6, s. 2, dd. 3, 4, pp. 342, 343.

(*u*) Moore v. Butlin, 7 A. & E. 595.

(*x*) Hawkyard v. Stocks, 2 D. & L. 936; Cock v. Gent. 13 M. & W. 364. See P. 2, ch. 6, s. 3, d. 3, p. 354.

(*y*) Wood v. Duncan, 7 Dowl. 91.

(*z*) Warwick v. Cox, 1 D. & L. 986. See P. 2, ch. 6, s. 4, p. 355.

(*a*) Wykes v. Shipton, 8 A. & E. 246.

(*b*) Cooper v. Langdon, 9 M. & W. 60.

(*c*) Maloney v. Stockley, 2 Dowl. N. S. 122. See P. 2, ch. 6, s. 4, p. 361.

been determined (*d*). If the arbitrator, when empowered, neglect, although requested, to decide a question raised by the pleadings as to the plaintiff's right to judgment non obstante veredicto, the award will probably be set aside (*e*).

Judgment non obstante veredicto.

When the arbitrator is bound to award some costs, and gives none, or to ascertain their amount, and fails to do so, a motion may be made to impeach his decision (*f*). On a general reference, when the costs of the cause abide the event of the award as to the cause, it will be a good ground of motion, that the arbitrator has awarded one gross sum in respect of the cause and all other matters together, since it cannot be seen for whom the cause is decided (*g*); or if the cause be determined for the plaintiff, since it cannot be said what amount of damages he has recovered in the action, so as to give information on what scale his costs are to be taxed (*h*). But if no injury can result to the defendant from the omission to separate the damages, the defendant will not be allowed to impeach the award for this defect (*i*).

Omitting to award rightly on costs.

Not deciding cause separately from other matters.

Party moving not injured by omission.

If an award respecting partnership matters be not final, for want of providing for the case of a deficiency of assets, and there be a deficiency in fact shown to the court, it will be set aside (*k*).

Award not providing for deficiency of partnership funds.

v. ***When the award is uncertain.***]—When the award is uncertain it may be set aside. Thus, if it be doubtful whether the award has decided the questions referred (*l*), or how it has determined them (*m*); so, when it leaves a disputed amount of money, other than costs, unascertained (*n*);

Uncertain award.

As to amount.

Not specifying persons.

(*d*) Doe d. Body v. Cox, 4 D. & L. 75. See P. 2, ch. 6, s. 5, d. 1, p. 362.

(*e*) Allen v. Lowe, 4 Q. B. 66; See P. 2, ch. 6, s. 5, d. 2, p. 363.

(*f*) Morgan v. Smith, 1 Dowl. N. S. 617. See P. 2, ch. 7, s. 1, d. 3, p. 373.

(*g*) Crosbie v. Holmes, 3 D. & L. 566.

(*h*) Lund v. Hudson, 1 D. & L. 236. See P. 2, ch. 7, s. 2, d. 2, p. 381.

(*i*) Taylor v. Shuttleworth, 6 Bing. N. C. 277.

(*k*) Routh v. Peach, 2 Anst. 519; S. C. 3 Anst. 637.

(*l*) Tribe & Upperton, In re, 3 A. & E. 295.

(*m*) Mortin v. Burge, 4 A. & E. 973. See P. 2, ch. 5, s. 5, d. 1i, p. 277.

(*n*) Marshall & Dresser, In re, 3 Q. B. 878. See P. 2, ch. 5, s. 5, dd. 2, 3, pp. 279, 281.

so when it does not specify which of two persons is to do a certain act (*o*); or, when empowered to give general directions what shall be done, the arbitrator fails to prescribe them with sufficient particularity (*p*).

Not precise in its directions.

Not finding on assets.

On a reference by an executor, an award ascertaining a balance due from the testator, and ordering the executor to pay the amount "out of the assets," will not be set aside as uncertain for omitting to ascertain whether there are assets (*q*).

Inconsistent and repugnant.

When the award is substantially inconsistent and repugnant, it will be set aside (*r*).

Excess of authority.

VI. *When the arbitrator has exceeded his authority.*]—That the arbitrator has exceeded his authority is a good ground of motion. Thus if he award on matters not submitted to him (*s*), or award as to costs without authority (*t*), or improperly direct costs to be taxed as between attorney and client (*u*), the award is open to objection; so if without power to say what shall be done by the parties, he give unwarranted directions as to the replacement of some fixtures (*x*); or if instead of deciding whether a title to an estate be good, he award that the party shall take it with all faults on receiving an indemnity (*y*); so if he attempt to regulate the payment of sums to come due in future, the submission being confined to present differences (*z*); so also if he award all the partnership stock and effects to one partner, when the submission contemplated a division be-

As to subject matters.

As to costs.

As to directions.

As to future payments.

As to partnership effects.

(*o*) Lawrence v. Hodgson, 1 Y. & J. 16. See P. 2, ch. 5, s. 5, d. 5, p. 287.

(*p*) Stonehewer v. Farrar, 6 Q. B. 730. See P. 2, ch. 8, s. 2, d. 3, p. 418.

(*q*) Love v. Honeybourne, 4 D. & R. 814.

(*r*) Ames v. Milward, 8 Taunt. 637. See P. 2, ch. 5, s. 7, p. 291.

(*s*) Tandy v. Tandy, 9 Dowl. 1044; Warren v. Green, Ca. temp. Finch. 141; Morgan v. Mather, 2 Ves. Jr. 15. See P. 2, ch. 5, s. 9. p. 316.

(*t*) Boodle v. Davies, 3 A. & E. 200. See P. 2, ch. 7. s. 1, dd. 1, 3, pp. 370, 373.

(*u*) Seckham v. Babb, 8 Dowl. 167. See P. 2, ch. 7, s. 1, d. 3, p. 375.

(*x*) Price v. Popkin, 10 A. & E. 139.

(*y*) Ross v. Boards, 8 A. & E. 290. See P. 2, ch. 8, s. 1, dd. 1, 5, pp. 395, 408.

(*z*) Morphett, In re, 2 D. & L. 967. See P. 2, ch. 8, s. 1, d. 2, p. 400.

tween the two (*a*): so if of his own authority he appoint a receiver to collect and apply money of a firm pursuant to the award (*b*): so likewise if he direct a party to do an act which would be a trespass on the property of another, or an act of waste for which he would be liable to his landlord (*c*).

Appointing a receiver. Ordering trespass or waste.

The excess will not in all cases form a ground of setting aside an award. Thus, where a party who had claimed compensation under the Lands Clauses Consolidation Act for his reversionary interest in some land required by a railway company, and who had demanded that the amount should be settled by arbitration, afterwards objected to the award, that the award assumed him to be in possession, and gave him a compensation for the immediate possession of the land, which was an excess of authority on the part of the umpire; the court said the answer to that objection was, that such assumption, if actually made, was in his favor and to his advantage, and was therefore no matter of complaint for him (*d*).

Excess in favor of party moving.

VII. *Where party or witness in fault, or new matter discovered.*]—If either party be guilty of fraudulent concealment of matters which he ought to have disclosed, or if he wilfully mislead or deceive the arbitrator, the award may be set aside (*e*).

Party deceiving opponent or arbitrator.

How far, when there has been no fraud or concealment, the mere discovery of new material matter will be a ground for setting aside the award, does not seem clear. According to the opinion of an Irish court of equity, if a claim within the scope of the reference have been accidentally omitted to

Whether discovery of new matter ground for setting aside award.

(*a*) Wood v. Wilson, 2 C. M. & R. 241. See P. 2, ch. 8, s. 1, d. 4, p. 406.

(*b*) Mackay, In re, 2 A. & E. 356. See P. 2, ch. 8, s. 4, d. 2, p. 428.

(*c*) Turner v. Swainson, 1 M. & W. 572. See P. 2, ch. 8, s. 4, d. 3, p. 429.

(*d*) Bradshaw & East & West India Docks and Birmingham Junction Railway Comp., In re, Q. B. June 2, 1848. See the facts of the case, P. 2, ch. 5, s. 10, p. 335.

(*e*) South Sea Company v. Bumstead, 2 Eq. Cas. Ab. 80; Mitchell v. Harris, 2 Ves. Jr. 129, a.; Metcalfe v. Ives, 1 Atk. 63; Gartside v. Gartside, 3 Anst. 735.

be brought forward, relief may be had in equity (*f*). In the English court of Exchequer, however, it was considered as very doubtful whether the fact that a material part of his case was not known to a plaintiff in a suit till after the award was made, would be sufficient to let in further inquiry (*g*).

On one occasion Lord Hardwicke, C., said, "I will not say that in no case whatever new matter discovered after the award will not affect it. But I do not know any case where it has been allowed. An award differs from a decree in this respect. A decree is compulsory; the parties cannot bring on their cause or delay it before the court. But an award is the judgment of judges of the parties' own choosing, and they need not submit until fully approved of the merits of their case, and if they do, it is their own fault. But justice in courts must be done in its course, and neither party can prevent it. It seems, therefore, of dangerous consequence to say, that new matter discovered will affect an award, as it will do a decree upon a bill of review" (*h*).

New evidence.

In another case, it is laid down by a court of common law, that it is not a sufficient ground for setting aside an award to allege merely that new evidence has been discovered since the award has been made. The affidavit must show what it is, that there is some surprise, and that it is such evidence as a reasonable diligence could not have obtained (*i*).

Discovery party examined a felon.

The Court of Common Pleas refused to set aside an award, on the ground that the parties had been examined by consent, and that subsequent to the award the plaintiff had discovered that the defendant was a convicted felon, then incompetent as a witness. The court laid some stress on the fact that the arbitrator stated that his judgment was founded wholly independently of the defendant's testimony (*k*).

(*f*) Brophy v. Holmes, 2 Molloy, 1.

(*g*) Gartside v. Gartside, 3 Anst. 735.

(*h*) Ld. Montgomery v. Buckley, Joddrell's MSS., cited in Heming v. Swinnerton, 1 Coop. C. C. 418, note.

(*i*) Eardley v. Otley, 2 Chitt. 42; Reynolds v. Askew, 5 Dowl. 682.

(*k*) Smith v. Sainsbury, 9 Bing. 31.

An award will not be set aside on the ground of married women or infants being parties to the submission, if the party objecting were aware of their condition, when he entered into the reference (*l*); nor will it be set aside because an infant is ordered to pay costs (*m*).

Married woman or infant parties.

After an extent in aid issued against the defendant, the prosecutor and the latter referred the question of the debt. Pending the reference, the defendant, who had inserted the debt in his schedule, was discharged by the Insolvent Debtor's Act, 1 G. IV. c. 119. The crown being no party to the reference, it was held that the defendant was discharged by his insolvency, and the award subsequently made was set aside (*n*).

Party insolvent.

On one occasion the court refused a motion to set aside an award, on the allegation that a witness had wilfully and corruptly given false evidence before the arbitrator, saying that proceedings might be taken against the witness for perjury, and that it would be setting a mischievous example to interfere at that time (*o*).

Perjury of witness.

When in the third term after the award was made the plaintiff moved to set it aside, on an affidavit of a witness, who stated, that before the arbitrator he had sworn that he had supplied certain goods to the defendant, whereas, in fact, by arrangement between them, they had not been delivered; and the plaintiff also swore that he had only in that term received information of the circumstance; the court refused the application, partly on account of the delay, but also on the ground that the witness might have been cross-examined before the arbitrator, and that to allow such an affidavit to be sufficient would open the door to innumerable frauds (*p*).

Incorrect statement of witness.

VIII. *When the award is under the statute of William*

(*l*) Warner, In re, 2 D. & L. 148; Wrightson v. Bywater, 3 M. & W. 199; Jones v. Powell, 6 Dowl. 483.

(*m*) Proudfoot v. Poile, 3 D. & L. 524.

(*n*) R. v. Bingham, 2 Tyrw. 46.

(*o*) Scales v. East London Waterworks, 1 Hodges, 91.

(*p*) Pilmore v. Hood, 8 Dowl. 21.

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the Third.]—In considering what may be the grounds of a motion to set aside an award, a distinction may be noticed between awards pursuant to submissions made rules of court by the inherent jurisdiction of the courts, and those on submissions of which the courts take cognizance by virtue only of the statute of William III. (*q*).

"Corruption or undue means" only grounds by statute.

In an old case it is laid down that under that statute nothing is a ground for impeaching the award but manifest corruption of the arbitrators (*r*); but the language of the Act provides that awards "procured by corruption *or undue means*," shall be set aside, thus not limiting the grounds to corruption only.

Proceeding contrary to justice is "undue means."

It is evident that the term "undue means" signifies something different from corruption, for although there be no ground for imputing improper motives to the arbitrator, the court will set aside the award as procured by "undue means," if the course pursued on the reference have been inconsistent with natural justice; as for instance, if the witnesses have been examined in the absence of the parties (*s*), or the plaintiff not allowed a proper opportunity of discussing his case (*t*).

Restriction of statute not adhered to.

The restriction, however, imposed by the language of the Act has subsequently been much disregarded, for the courts will listen to applications to set aside awards under the statute on other grounds than the two enumerated in the section (*u*); even when the motion was refused as being made later than the statute allowed, no objection was suggested, that the grounds that the award was defective on its face (*x*), or that the arbitrator had not sufficient materials before him, were such as the court could not entertain (*y*). On the contrary, where, the submission being under the statute, the arbitrator by consent had set out facts for the opinion of the

Error in law on face of award.

(*q*) 9 & 10 W. III. c. 15.

(*r*) Anderson v. Coxeter, 1 Stra. 301.

(*s*) Plews & Middleton, In re, 6 Q. B. 845; Harvey v. Shelton, 7 Beav. 455.

(*t*) Spettigue v. Carpenter, 3 P. W. 361; S. C. Vin. Ab. Supp. Arb. p. 301.

(*u*) Veale v. Warner, 1 Saund. 327, d. notes.

(*x*) Lowndes v. Lowndes, 1 East, 276.

(*y*) Zachary v. Shepherd, 2 T. R. 781.

court, the court set aside a part of the award as deciding contrary to law on the case stated (*y*). And Lord Eldon, C., observing on the Act in one instance, remarked, "There is one case in which the courts have not considered themselves strictly bound by the words of the statute. The Act is silent as to mistake or error of the arbitrators, yet it is now settled that an award may be set aside for mistake or error, if admitted by the arbitrators" (*z*).

Mistake admitted.

SECTION IV.

MOVING TO SET ASIDE AN AWARD.

How affidavits to be entitled.

1. *The affidavits on a motion to set aside an award.*]— Where a cause is referred by judge's order, order of Nisi Prius, or rule of court, the affidavits in support of or in answer to the rule for setting aside the award should be entitled in the cause, and with the christian and surnames of the parties (*a*).

If the reference of the cause take place out of court by agreement under the statute of William the Third to be made a rule of the court in which the cause is pending, it is said to have been the practice to entitle the affidavits in the cause; but on one occasion of such a reference, where the mode of entitling the affidavits on a motion for attachment for non-performance of the award was discussed, no objection was taken to the heading of the affidavits used on the cross motion to set aside the award, although they were only

(*y*) Webb, In re, 8 Taunt. 443.

(*z*) Nichols v. Chalie, 14 Ves. 265; S. C., cited in Heming v. Swinnerton, 1 Coop. C.C. 419, from a MSS. note of the judgment.

(*a*) Bainbrigge v. Houlton, 5 East, 20; Anon. 1 Smith, 358.

entitled, "In the matter" of the parties (*b*). As it has been held that the jurisdiction of the court over the award on such a reference depends on the statute only (*c*), it is submitted that there is no necessity to entitle the affidavits in the cause, though as there seems to be nothing objectionable in such a course it would be the safer plan to do so (*d*).

Where there is no cause in court, and the submission is solely by virtue of the statute, the affidavits either for or against the motion require no title at all, though they may be, and often are, entitled, "In the matter," &c. (*e*); and if they be headed "In the matter of the arbitration between A. B. plaintiff, and C. D. defendant," there being no cause referred, the terms plaintiff and defendant improperly introduced will be merely treated as surplusage (*f*).

Whether stamp on affidavit requisite.

Till recently, when there was no cause in court, the affidavits required a stamp, not being exempted from the General Stamp Act, 55 Geo. III. c. 184, by the 5 Geo. IV. c. 41, which enacted that no stamp should be necessary on affidavits "to be filed, read, or used, *in any action or suit*, in any of the courts of law or equity at Westminster," &c. (*g*). They are, however, it is presumed, relieved from stamp duty by the more general words of the 4 & 5 Vict. c. 34, s. 1, which amends the 5 Geo. IV. c. 41, and provides that no stamp shall be necessary on any "affidavits whatsoever, whether to be read, filed, or used in the said courts, or before judges, commissioners, or officers, in any action or suit, or otherwise howsoever."

What sufficient affidavit verifying award.

The affidavit verifying the copy of the award to be a true copy need not state that the copy was compared with the original, for cases may frequently occur, where the party may never see the original award, but only have a copy furnished

(*b*) Whitehead v. Firth, 12 East, 166.

(*c*) Rushworth v. Barron, 3 Dowl. 317; Reynolds v. Askew, 5 Dowl. 682.

(*d*) Imesom & Horner, In re, 8 Dowl. 651.

(*e*) Whitehead v. Firth, 12 East, 166; Bainbrigge v. Houlton, 5 East, 20.

(*f*) Imesom v. Horner, In re, 8 Dowl. 651; Anon. 1 Smith, 358.

(*g*) Templeman & Reed, In re, 9 Dowl. 962.

him (*h*). An affidavit by the clerk to the town agent of the plaintiff's attorney, "that the paper writing hereto annexed marked D. is a true copy of the award or umpirage of A. B., as this deponent has been informed and believes," and that he received the said paper writing from the plaintiff's attorney in the country, was held a sufficient verification (*i*). So an affidavit by the defendant "that the paper writing marked A. was on," &c., "delivered by the arbitrator personally into the hands of this deponent as a copy of the award made by him in this cause," was considered to be a primâ facie proof that the copy was a correct copy (*k*). So, also, an affidavit "that the paper writing annexed to the affidavit was, or contained, as the deponent (the defendant) believed, a true copy of the award, the deponent having been served with the same by the attorney of the plaintiff," was held sufficient (*l*).

Immaterial alterations in affidavit.

As immaterial alterations in the affidavit will not vitiate it, it is not necessary, if sworn before a commissioner, that his initials should be put to such alterations, in order to show that they were made previous to its being sworn (*m*).

Who may move to set aside award.

II. *The motion to set aside an award.*]—The parties to the submission or their representatives may move to set aside the award (*n*).

Executor of a party.

The executors or administrators of a deceased party being, as we have seen, at liberty to enforce it, and liable to its burdens as far as they have assets, have, it is presumed, a clear right to apply to set it aside (*o*).

Bankrupt or insolvent.

When bankruptcy or insolvency does not free the party from liability to perform an award, he cannot by such bankruptcy or insolvency be precluded from moving to set it

(*h*) Hawkyard v. Stocks, 2 D. & L. 936.
(*i*) Hawkyard v. Stocks, 2 D. & L. 936.
(*k*) Lund v. Hudson, 1 D. & L. 236.
(*l*) Hayward v. Phillips, 6 A. & E. 119.
(*m*) Imesom v. Horner, 8 Dowl. 651.
(*n*) Tyler v. Jones, 3 B. & C. 144; Lewis v. Winter, W. W. & D. 47; Tayler v. Marling, 2 M. & G. 55; Lewin v. Holbrook, 11 M. & W. 110.
(*o*) Ex parte, Kempshead, 1 Rose, 149.

aside, for he is clearly aggrieved by an improper award against him (*p*).

Assignee.

Whenever the assignee, as is generally the case, has an interest in the award, it does not seem to be questioned that he would be entitled to move to impeach it (*q*).

Clause not to sue not preclude motion.

The clause in the submission prohibiting the parties from bringing any action or suit respecting the matters referred does not apply to prevent a motion to set aside the award (*r*).

Award raising point of law.

When an arbitrator, after finding a verdict for the plaintiff, states facts, which show that the plaintiff could not legally sustain his action, but makes no provision for entering a nonsuit or finding a verdict for the defendant, in case the opinion of the court be against the validity of the plaintiff's claim, the court cannot order a nonsuit to be entered; but the proper application is to set the award aside (*s*).

Motion to set certificate aside.

Generally, the certificate by an arbitrator is looked upon as an award for all purposes of setting it aside, but if a verdict be taken subject to a certificate respecting the amount of damages, and the certificate be merely a note to the officer of the court, and be not considered an award, and there be grounds of objecting to it, the application to the court should be not to set aside the certificate, but the verdict entered according to it (*t*).

Moving on last day of term.

The motion to set aside an award cannot, it is said, be made on the last day of term (*u*). On one occasion, however, in the Court of Common Pleas, where, on the last day of term, a motion was made by the plaintiff to have his costs taxed pursuant to an award, the Master having refused to tax them until the time for setting aside the award had expired; the court called on the defendant's counsel to move

(*p*) Hemsworth v. Brian, 7 M. & G. 1009. See S. C. not S. P. 1 C. B. 131. Taylor v. Shuttleworth, 8 Dowl. 281; Marsh v. Wood, 9 B. & C. 659; R. v. Bingham, 2 Tyrw. 46.

(*q*) Hobbs v. Ferrars, 8 Dowl. 779; Tayler v. Marling, 2 M. & G. 55.

(*r*) Mackay, In re, 2 A. & E. 356.

(*s*) Peters v. Anderson, 5 Taunt. 596.

(*t*) Carmichael v. Houchen, 3 N. & M. 203.

(*u*) Nettleton v. Crosby, 1 Tidd, Pract. 498, 9th Ed.; Watkins v Phillpotts, M'Lel. 2 Y. 393.

to set the award aside; and the motion was made and the rule refused on that day (*x*).

Submission must be made rule before motion.

The submission must be made a rule of court (where it is not one already) before any application to set aside the award can be entertained (*y*). There is no inconsistency in a party's taking this step for the purpose of enabling him to impeach the award; for it is the submission and not the award itself which is made a rule of court, and the party thereby only affirms that he has given an authority to the arbitrator which the latter has abused (*z*).

Motion in court.

The motion must be made by the party aggrieved or by his counsel in open court, on affidavits verifying the award or copy of the award, and when the objection is extrinsic, stating the circumstances which it is contended render the award bad. Where an arbitrator, who by mutual agreement of the parties had closed the case, refused the application of the defendant's attorney for another hearing to receive new evidence in reply to some accounts put in by the plaintiff; a motion to set aside the award made on the affidavit of the defendant's attorney, alleging generally that he was not aware of the nature of the accounts, and that he was in possession of evidence sufficient to outweigh them, was refused (among other grounds) on this, that as he could only know the effect of the evidence from the defendant, the court could not set aside the award without an affidavit from the defendant himself (*a*).

When party's own affidavit requisite.

Affidavit by barrister arbitrator.

The arbitrator, if a barrister, will not in general, in accordance with a rule laid down by the bar, and sanctioned by the judges, make any affidavit in order to support or defeat an application to set aside the award (*b*); nor though he be willing to furnish the court with his notes of the evi-

(*x*) Hobdell v. Miller, 2 Scott, N. R. 163; S. C., in the notes to Little v. Newton, 1 M. & G. 978.

(*y*) Harrison v. Grundy, 2 Stra. 1178; Bottomley v. Buckley, 4 D. & L. 157: Perring & Keymer, In re, 3 Dowl. 98; Ross v. Ross, 16 L. J., Q. B. 138. See P. 3, ch. 5, s. 1, p. 544.

(*z*) Heming v. Swinnerton, 16 L. J., Ch. 287.

(*a*) Ringer v. Joyce, 1 Marsh. 404.

(*b*) See P. 2, ch. 9, s. 4, d. 3, p. 449.

dence for the purpose of the argument will the court receive them, or approve of a verified copy of them being used, as either course would be an infringement of the spirit of the above rule (*c*).

Lay arbitrator.

There is no objection to affidavits being made by lay arbitrators; they consequently are often the most material witnesses as to the facts. How far the courts will take into consideration the statement of an arbitrator as to the grounds of his award not made upon oath, but brought before the court by the affidavit of another, has been previously fully discussed (*d*).

Statements of arbitrator not on oath.

Affidavits after motion.

After the court has taken the objection that the application to set aside the award is made too late, the court will not allow affidavits to be then filed to account for the delay (*e*).

Filing affidavits.

Whether the rule nisi be refused or granted, the party must file the affidavits on which the motion is made; but if he neglect to do so, the court will not grant a rule to compel him, until he has been called upon by his opponent to file them (*f*).

Second motion to set aside award.

The courts will very rarely permit a second application to set aside an award, when the party has once failed in consequence of a defect in the way in which he has brought his case forward. The courts will assume that the objections taken on the first rule are all that can be taken to the award (*g*). The only excepted instances are where the defects are in the title or jurat of the affidavit (*h*).

In one instance, where the rule was discharged on a preliminary technical objection, that a copy of the award had not been annexed to the affidavit verifying it, and that therefore the court had not the contents of the award before it; Patteson, J., expressed his opinion that had the rule

(*c*) Doe d. Haxby v. Preston, 3 D. & L. 768. See P. 2, ch. 9, s. 4, d. 3, p. 449.

(*d*) P. 2, ch. 5, s. 8, d. 2, p. 300; P. 2, ch. 9, s. 4, d. 2, p. 447.

(*e*) Riccard v. Kingdon, 15 L. J., Q. B. 269.

(*f*) Pilmore v. Hood, 8 Dowl. 21.

(*g*) Hellyer & Snook, In re, 2 Chitt. 265; R. v. Great Western Railway Company, 1 D. & L. 874.

(*h*) R. v. Great Western Railway Company, 1 D. & L. 874.

been discharged within the term limited for moving to set aside the award, the party might within the term, as a matter of course, have obtained a fresh rule on correcting his mistake, as the defect was not in the substance of the affidavit, but a mere slip of form; and he allowed a second application to set the award aside, although the term had expired, as the previous rule had been enlarged by consent (*i*); but on a subsequent occasion the same learned judge, with the concurrence of the full court of Queen's Bench, intimated that in the above case he thought he had gone too far, and that the latitude then allowed was very questionable (*k*).

SECTION V.

THE RULE NISI ON MOTIONS TO SET ASIDE AN AWARD.

On reading what rule nisi drawn up.

1. *Drawing up the rule nisi to set aside the award.*]— The rule nisi for setting aside the award should be drawn up on reading the rule of court embodying the submission. It is not enough that that rule should be set out in the affidavits (*a*). It should be drawn up on reading also the affidavits on which the motion is grounded, and according to one case in the Exchequer, on reading the award as well (*b*). Though a rule to *enforce* an award must be drawn up on reading the original award, it is in general held unnecessary to draw up a rule to *set aside* an award on reading the award, or even a copy of the award, (though the latter course is frequently adopted) (*c*),

(*i*) Sherry v. Oke, 3 Dowl. 349.

(*k*) R. v. Great Western Railway Company, 1 D. & L. 874.

(*a*) Christie v. Hamlet, 2 M. & P. 316; S. C. 5 Bing. 195; Crosbie v. Holmes, 3 D. & L. 566, 568, note; Ross v. Ross, 16 L. J., Q. B. 138.

(*b*) Barton v. Ransom, 5 Dowl. 597.

(*c*) Lund v. Hudson, 1 D. & L. 236; Crosbie v. Holmes, 3 D. & L. 566, 568, note.

or to make any distinct reference to the award in terms on the face of the rule; for it has been decided both in the Queen's Bench and Exchequer that it is sufficient to draw it up "on reading the affidavit of A. B. and the paper writing annexed," provided the affidavit verify the paper annexed as a copy of the award (*d*).

Amending rule nisi.

Where, however, the rule was drawn up "on reading the affidavit of A. B.," which verified a copy of the award as a true copy, but no copy of the award was annexed to the affidavit, Patteson, J., held that the court had not the award before it, and therefore discharged the rule (*e*). It was urged in that case, that he might allow the rule to be amended, but after consultation with the other judges of the Queen's Bench, he declared that the court had no power to allow an amendment; and he observed that if he were to allow an amendment to be made, it could only be done on an affidavit that the document was in the same state at the time of granting the amended rule as at the time of obtaining the original one, and that then the rule would appear to be drawn up on reading an affidavit sworn after the rule had been granted.

On one occasion, however, where a counsel who had obtained a rule nisi to set aside an award, moved the following day to be allowed to file another affidavit in support of his rule, on the ground that he had stated a fact at the time of making the motion, thinking it was supported by the affidavit, but had since found that it was not. The court, though they had expressed a strong disinclination to depart from the general rule not to allow affidavits to be filed after a rule obtained, granted the application on condition of the affidavit being filed the same day (*f*).

Not after time for moving expired.

When the submission is under the statute, the rule nisi for setting aside an award cannot be amended after the time limited by the statute has expired by drawing it up on read-

(*d*) Hayward v. Phillips, 6 A. & E. 119; Platt v. Hall, 2 M. & W. 391.

(*e*) Sherry v. Oke, 3 Dowl. 349.

(*f*) Perrin v. Kymer, 1 H. & W. 20; S. C. 4, N. & M. 477.

ing an additional affidavit, sworn on the last day of term, a day too late under the statute (*g*).

Whether rule to be drawn up on reading the record.

On a rule to set aside an award, as on a rule to set aside a verdict, the Court of Queen's Bench will look at the record in the cause if necessary, although the rule be not drawn up on reading it; but as in the Common Pleas a rule for setting aside a verdict is drawn up on reading the record, it is presumed that in the case of setting aside an award in that court the same course should be pursued, whenever it is requisite to bring the record to their notice (*h*).

On reading pleadings when no record.

If, however, from the nature of the objections, it become necessary for the court to look at the pleadings in a second action referred together with the one, in which the order of reference is made and the verdict taken by consent, the pleadings in that second action ought to be brought before the court by the affidavits in support of the motion, and the rule is obtained improperly if they be not stated in them; though if the affidavits in answer set them forth, the court will look at the whole pleadings, and decide on the objections raised (*i*).

If a cause be referred before plea by a judge's order, and an objection to the award be founded on the contents of the declaration, it seems proper to draw up the rule nisi on reading the declaration (*k*).

II. *Stating the grounds of motion in the rule nisi.*]—By a rule of the Court of King's Bench of E. T. 2 Geo. IV., A. D. 1821, "it is ordered that in future, where a rule to show cause is obtained in this court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to show cause" (*l*).

Rule E. T. 2 Geo. IV. K. B.

(*g*) Holloway & Monk, In re, 8 Dowl. 138.
(*h*) Sherry v. Oke, 3 Dowl. 349.
(*i*) Allen v. Lowe, 4 Q. B. 66.
(*k*) Crosbie v. Holmes, 3 D. & L. 568, note.
(*l*) 4 B. & A. 539.

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This rule was, in 1829, adopted verbatim by the Court of Common Pleas in the Reg. Gen. M. T. 10 Geo. IV. (*m*).

Reg. Gen. M. T. 10 Geo. IV. C. P.

As early, however, as 1822, that court approving of the practice of the Court of King's Bench, stated that they henceforth made it a rule that the grounds on which the application to set aside the award rested, should be stated in the rule nisi (*n*); and in 1828 they held it an objection to a rule nisi to set aside an award, that it failed to specify the grounds of the motion; but as there was then no written rule of court on the subject in that court, they considered that the practice was not so inflexible as to prevent them hearing the objections, although not so specified (*o*).

Rule in the Exchequer.

The Court of Exchequer early adopted the rule of the Court of King's Bench (*p*); for in 1825 it was said to be the invariable practice, on the plea side of the Court of Exchequer, that the rule nisi for setting the award aside should specify the grounds on which it was sought to impeach it; and in that year a statement in the rule, that the award is illegal, informal, partial, inconclusive, and uncertain, "for the reasons stated in the affidavits," was considered insufficient: but it being stated by the plaintiff's counsel that the same rule did not hold on the equity side of that court, where the case arose, (the reference being by bond of all matters in dispute, among which was a suit in the equity side of the court,) the court allowed the validity of the award to be discussed (*q*).

Rule applies to certificate of arbitrator.

The rule requiring the grounds of objection to an award to be stated in the rule nisi applies equally to a certificate, whether the arbitrator is to certify generally for whom the verdict is to be entered, or only to certify to the associate the amount of damages for which the verdict for the plaintiff is to be entered (*r*). In one instance, where the grounds

(*m*) 6 Bing. 348; S. R. 3 M. & P. 762.

(*n*) Smith v. Briscoe, 11 Price, 57.

(*o*) Dicas v. Jay, 5 Bing. 281; S. C. 2 M. & P. 448; Christie v. Hamlet, 5 Bing. 195.

(*p*) 2 Tidd, Pract. 845, 9th Ed.; Dicas v. Jay, 2 M. & P. 448.

(*q*) Watkins v. Phillpotts, M'Lel. & Y. 393.

(*r*) Carmichael v. Houchen, 3 N. & M. 203; Whatley v. Morland, 2 C. & M. 347.

were omitted, Bayley, B., held that the rule might be amended on that point (*s*).

Party confined to grounds stated in the rule.

In general, however, the party cannot avail himself of any ground which he does not specify. Thus, where an award was considered bad for not giving damages on an issue found for the plaintiff; the court said, that, as the objection was not hit by the rule nisi, they could not set aside the award (*t*).

Stating objections specifically.

It is not sufficient to state in the rule the head of objection on which the party means to rely, as that the award is uncertain, not final, that the arbitrator has exceeded his authority, or that he has not awarded on all the matters referred to him; but the rule should state each objection specifically, and show in what respect the award is uncertain, or not final, in what respect he has exceeded his authority, and in what respect he has failed to decide all the matters submitted; for the purposes of the regulation would be defeated, if parties might state a general objection, and then go into any number of particular objections which might range themselves under it; and as different objections might, on reading an award, occur to different minds, it might happen that a party supporting an award against a rule stating the objections in a general form, might raise some objection which had not been thought of by the opposite side (*u*).

Forms of objection too general.

The following objections, that "the facts stated by the arbitrator on the face of his award are not sufficient to enable the court to decide the points of law thereby intended to be raised, or the several points of law which he was requested by the defendant to raise;" "that the arbitrator has not by his said award raised the points which on the part of the plaintiff he was requested to raise;" "that the award is not final, certain, and mutually binding, because it raises points for the opinion of the court which the arbitrator was not requested by either party to raise or state on the face of his award" (*x*); "that the arbitrator has made his award

(*s*) Whatley v. Morland, 2 C. & M. 347.

(*t*) Grenfell v. Edgcome, 7 Q. B. 661.

(*u*) Boodle v. Davies, 3 A. & E. 200; Jones v. Powell, 6 Dowl. 483.

(*x*) Bradbee v. Christ's Hospital, 4 M. & G. 714.

under a misapprehension of the terms of the reference" (*y*); have all been considered to be too general.

Whether general statement helped by specific affidavit.

Sometimes, however, the generality of the statement of objection in the rule has been held to be cured by the particularity of the affidavit in pointing out the particular defect. Thus where the rule stated as the ground of moving, that the arbitrator had not decided all matters in difference, and the affidavit on which it was obtained specified certain matters alleged to have been in difference, and which were not mentioned in the award; the court held that the rule coupled with the affidavit sufficiently explained the nature of the objection, so as to satisfy the general regulation (*z*).

This lax construction of the regulation of the court, that the rule nisi might be helped out by the affidavits, was disapproved of in a following case, where the degree of particularity above stated to be requisite was held to be what was intended (*a*); and in a later instance Coleridge, J., stated that *Rawsthorn* v. *Arnold* (*b*), was not an authority on which he was disposed to act (*c*).

But in a more modern case in the Exchequer, where the rule nisi was obtained among others on a ground "that the arbitrator had not awarded on a matter in difference submitted to him," and the objection was taken that it was too general, and the two last mentioned cases were cited, the court held it sufficient; as the object of the rule was, that parties should not wander about in search of the defect relied on by their opponents, and in the case before them the affidavits directed the attention to that matter in difference which it was alleged by the rule had not been awarded on (*d*). And later still, Wightman, J., refusing to allow a party to rely on a statement in the rule nisi "that the arbitrator had exceeded his authority," stated, that had the affidavits specifically pointed out any objection of the nature of excess, he should have considered himself bound by the au-

(*y*) Allenby v. Proudlock, 4 Dowl. 54.

(*z*) Rawsthorn v. Arnold, 6 B. & C. 629.

(*a*) Boodle v. Davies, 3 A. & E. 200.

(*b*) 6 B. & C. 629.

(*c*) Gray v. Leaf, 8 Dowl. 654.

(*d*) Dunn v. Warlters, 9 M. & W. 293; S. C. 1 Dowl. N. S. 626.

thorities to hold it sufficient, until there had been a declaration of the court to the contrary (*d*).

Particular words limiting general statement.

If the rule nisi state an objection in general words, which are followed by particular words of complaint, even supposing under the general statement, if it stood alone, a particular defect might have been brought before the court, still by the latter clause the inquiry would be narrowed to the grievance specified therein (*e*).

Statement too general void.

The effect of a ground of objection being too general is merely to prevent the party taking advantage of it: it does not hinder him relying on other grounds of objection, which are sufficiently specifically stated in the rule (*f*).

Amending rule according to motion.

If the rule be not drawn up agreeably to the motion made in court, as for instance, if it be moved on some grounds, and others not specified in the application be added without permission of the court, the party supporting the award should apply to have the rule amended (*g*).

SECTION VI.

SHOWING CAUSE AGAINST THE RULE TO SET ASIDE AN AWARD.

Taking office copy of affidavits.

1. *Practice on showing cause against the rule.*]—Before showing cause, the party opposing the rule should take an

(*d*) Staples v. Hay, 13 L. J., Q. B. 60; S. C. 1 D. & L. 711.

(*e*) Boodle v. Davies, 3 A. & E. 200.

(*f*) Boodle v. Davies, 3 A. &. E. 200; Gray v. Leaf, 8 Dowl. 654.

(*g*) Bradbee v. Christ's Hospital, 4 M. & G. 714, 745.

office copy of the affidavits on which the rule has been obtained(*a*), but he is not bound to take office copies of the award or other exhibits attached to the affidavits; and the practice now, is not to do so (*b*).

Showing cause on last day of term.

According to a rule of the Court of Queen's Bench (*c*), and the practice of the Common Pleas (*d*), cause cannot be shown against the rule for setting aside an award on the last day of term, but the rule will be enlarged and made peremptory for the next term. In the Exchequer, however, the practice does not seem so strict, for instances are not wanting when the argument against an award has been heard on the last day of the term (*e*).

Turning motion into special case.

Sometimes, when cause is about to be shown, if the facts be complicated, the court will direct that the matter be turned into a special case, and the validity of the award will be considered when the case comes on for argument (*f*).

Showing cause.

II. *What may be shown for cause against the rule.*]—The party supporting the award may show for cause why the rule should be discharged, the preliminary objections, that the application to set the award aside has been made too late (*g*); or that the affidavits on which the motion has been made are defective (*h*); or that the rule nisi is improperly drawn up (*i*). So with regard to the merits he may bring forward affidavits to deny or explain away the matters of fact alleged as the grounds of motion; or if the imputation be of a defect in law, he may support the sufficiency of the award by argument, so as at least to render it doubtful whether the award

Motion too late.

Affidavits defective.

Grounds false in fact.

Point of law doubtful.

(*a*) Brown v. Probert, 1 Dowl. 659.
(*b*) Hawkyard v. Stocks, 2 D. & L. 936.
(*c*) M. T. 36 G. III. K. B.
(*d*) Bignall v. Gale, 2 M. & G. 364.
(*e*) Phillips v. Evans, 12 M. & W. 309.
(*f*) Staniforth v. Lyall, 4 M. & P. 829; Hocken v. Grenfell, 4 Bing. N. C. 103.
(*g*) See s. 2 of this chapter, p. 615.
(*h*) See s. 4 of this chapter, d. 1, p. 639.
(*i*) See s. 5 of this chapter, d. 1, p. 645.

be bad, and if he succeed so far the court will not set it aside (*k*).

Error in favor of party moving.

It may be shown as good cause, that the error for which the party is seeking to impeach the award is one in his own favor, and by which he cannot possibly be injured (*l*).

Irregularity waived.

If the award be impeached on the ground of an irregularity in the proceedings before the arbitrator, it may be shown in answer to the motion, that the irregularity was waived by the subsequent conduct of the party attempting to rely on it (*m*).

Not when public justice interested.

But when an award is impeached on the ground of one party in the absence of the other holding private meetings with the arbitrator, similar misconduct on the part of the other party cannot be relied on to prevent the court setting aside an award, for the matter concerns not the individual only, but the due administration of justice (*n*).

Time enlarged by consent.

If the ground of motion be, that the award was made after the limited time, it may be shown for cause that by his conduct the party objecting had impliedly or expressly consented to enlarge it (*o*).

Matter omitted never brought forward to be decided.

Where the ground charged is, that the award is not final for leaving a particular question undecided, it may be answered by proving that the question was never brought before the arbitrator at all (*p*), or only for a collateral purpose, and not as a matter in difference for his decision (*q*), or that the parties had practically agreed that he need not determine it (*r*).

No dispute about matter left undecided.

If the award be assailed for uncertainty in not specifying the amount of a sum of money, or in any other particular, it may be argued that the court will presume there was no dispute

(*k*) Cock v. Gent, 13 M. & W. 364.

(*l*) Taylor v. Shuttleworth, 6 Bing. N. C. 277; Moore v. Butlin, 7 A. & E. 595. See ante, p. 335, Ex parte Bradshaw.

(*m*) Bignall v. Gale, 2 M. & G. 830. See P. 2, ch, 4, s. 1, dd. 9, 10, pp. 185, 189; P. 2, ch. 4, s. 4, dd. 3, 5, pp. 221, 231.

(*n*) Harvey v. Shelton, 7 Beav. 455.

(*o*) Hallett v. Hallett, 7 Dowl. 389. See P. 2, ch. 3, s. 2, d. 2, p. 141.

(*p*) Middleton v. Weeks, Cro. Jac. 200.

(*q*) Rees v. Waters, 16 M. & W. 263. See P. 2, ch. 5, s. 4, d. 1, p. 251.

(*r*) Rees v. Waters, 16 M. & W. 263; Cooper v. Langdon, 9 M. & W. 60.

about the question, or it may be shown that in fact there was none (*s*).

Affidavits to support award bad on face.

In a late case, an award being objected to, on the ground that a direction in it was uncertain, it was admitted that the direction was uncertain and void; but it was contended that it was mere surplusage, and would therefore not affect the rest of the award, as it was said that the arbitrator had no power to make the direction at all; it being, as was alleged, respecting a matter not in difference: on affidavits being referred to to prove that such was the fact, Lord Denman, C. J., expressed a doubt whether the court would look into affidavits to support an award bad on its face (*t*).

Party moving having accepted money under the award.

If the plaintiff have accepted the costs of the reference and award, which by the terms of the rule of reference were to be paid to him by the defendant, this is such an admission of the validity of the award, (for if there were no award no costs would be due,) that it may be shown as a conclusive answer to the plaintiff's attempt to set the award aside (*u*).

Having paid money awarded.

It has been decided in Chancery that a voluntary payment of the amount awarded, with full knowledge of all the facts on which the party relies to avoid the award, will prevent him from sustaining proceedings to set it aside (*x*). But in a more modern instance at common law, Patteson, J., on an ex parte application, said, that it did not appear to him that the fact of having paid the money made any difference, or prevented the party from moving to set the award aside; and he granted a rule nisi for that purpose (*y*).

Allowing opponent to act on award.

It cannot be shown for cause, on a motion by a tenant, that by allowing his landlord, without objection, to do repairs to the demised premises, pursuant to the directions of the award, he has waived his right to impeach it (*z*).

(*s*) Cargey v. Aitcheson, 2 B. & C. 170. See P. 2, ch. 5, s. 5, d. 4, p. 284.

(*t*) Marshall & Dresser, In re, 3 Q. B. 878.

(*u*) Kennard v. Harris, 2 B. & C. 801.

(*x*) Goodman v. Sayers, 2 J. & W. 249.

(*y*) Bartle v. Musgrave, 1 Dowl. N. S. 325.

(*z*) Hayward v. Phillips, 6 A. & E. 119.

SECTION VII.

DISCHARGING OR MAKING ABSOLUTE THE RULE TO SET ASIDE AN AWARD.

1. *Result of the motion to set aside the award.*]—The courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected, and which in so many instances acts most beneficially for them (*a*). On one occasion, however, Coleridge, J., observed, "There are many expressions in the cases as to the manner in which the courts ought to construe awards, which appear to me to be often used with too much strength. Awards are to be construed sensibly as all other instruments (*b*).

Courts favor validity of awards.

The courts will not set an award aside on motion, unless it be clearly void on the grounds on which it is impeached, because then there is an end of it altogether; whereas if an action be brought, the question of its validity may be in general more formally raised, and taken to a court of error (*c*).

Award not set aside unless clearly void.

After cause has been shown, the court usually will either discharge the rule, or make it absolute; but on one occasion, after the argument, the Court of Common Pleas enlarged the rule till the following term, to give the parties the opportunity of filing fresh affidavits, in order that the facts might be more fully stated; additional affidavits were accordingly filed, and the case was re-argued in the subsequent term (*d*).

Allowing fresh affidavits after argument.

When the arbitrator has exceeded his power in awarding on a matter not submitted to him, or in giving unauthorized

Award set aside in part only.

(*a*) Templeman & Reed, In re, 9 Dowl. 962.

(*b*) Stonehewer v. Farrar, 9 Jur. 203.

(*c*) Cock v. Gent, 13 M. & W. 364; Stalworth v. Inns, 13 M. & W. 466.

(*d*) Little v. Newton, 2 M. & G. 351, 353.

directions, if the portion of the award containing the excess can be entirely separated, that alone may be set aside, while the rest of the award will stand good; but if the court cannot see that that part of the award made in the proper exercise of his authority is wholly unaffected by the objectionable provisions, the entire award must fall (*e*). So though it be not final, (as when finding substantially for the plaintiff, it fails to decide all the issues, on the event of which the costs depend), the plaintiff, by allowing the defendant costs on all issues undetermined, may maintain the award as to the good part (*f*). So also if it be defective for want of certainty as to a part which is separable; as, for instance, if it award costs without ascertaining their amount, when the arbitrator ought to have found it, the whole award need not be set aside; but the rest may be supported, if the party alone intended to be benefited by the provisions as to the costs agree to waive all claim to them (*g*).

Where a cause and all matters in difference were referred, and the arbitrator found for the plaintiffs in the cause, and then stated facts pursuant to a power given in the submission; the court, deciding that the action could not be maintained on the case stated in the award, directed a non-suit to be entered in the action, and that the rest of the award should stand good. The report does not show whether there was a conditional award of a nonsuit in case the court should be of opinion that the plaintiff was not entitled to recover. It is also to be noticed that the court came to this decision on an application to set the award aside (*h*).

New trial when award in a cause set aside.

When a verdict is taken subject to a reference, if the award be set aside there must be a new trial, as the verdict is subject to the award; if one fall the other must follow (*i*).

Discharging rule with costs.

II. *Costs of the motion to set aside the award.*]—When

(*e*) Tandy v. Tandy, 9 Dowl. 1044. See P. 2, ch. 5, s. 9, p. 316.

(*f*) England v. Davison, 9 Dowl. 1052.

(*g*) Morgan v. Smith, 1 Dowl. N. S. 617. See P. 2, ch. 5, s. 9, d. 1, p. 316.

(*h*) Sherry v. Oke, 3 Dowl. 349.

(*i*) Thompson v. Jennings, 10 Moore, 110.

the rule is discharged, the court will, as in other cases, exercise a discretion whether it is to be discharged with costs. If the motion have been made on slight grounds, the rule will generally be discharged with costs (*k*). Where the objection was, that the arbitrator had decided contrary to law, costs were refused, on the ground that the point had been fully submitted to the court when the rule was moved (*l*). In a later case, where the award was assailed as repugnant for finding inconsistent issues in favor of the same party, costs were granted, Lord Denman, C. J., intimating that in such cases the practice was to discharge the rule with costs (*m*).

Costs of motion when costs in the cause.

Where a rule for setting aside an award on a cause is discharged, and nothing said about the costs of the motion, they will be costs in the cause (*n*). Where the arbitrator had directed a verdict for the plaintiff, and stated special facts in his award, on which the defendant moved to set it aside, but the court directed the verdict to stand for the plaintiff, but at an amount of damages less than the arbitrator had given; the plaintiff was held to be entitled to the costs of showing cause against the rule, although the defendant had succeeded in part: for the practice has always been to consider these costs as costs in the cause, since there is, in fact, no verdict until the discussion of the award is over, and therefore all proceedings till then are steps in the cause (*o*). Where the defendant put a construction upon the award which induced the plaintiff to move to set it aside, and the court, considering the defendant's construction untenable, discharged the plaintiff's rule, it was held that the plaintiff was not entitled to the costs of the motion; and Tindal, C. J., said, that as the award was not set aside, the motion must take the ordinary course, and the costs of it be costs in the cause (*p*).

(*k*) Snook v. Hellyer, 2 Chitt. 43.

(*l*) Wade v. Malpas, 2 Dowl. 638.

(*m*) Duke of Beaufort v. Welch, 10 A. & E. 527.

(*n*) Clarke v. Owen, 2 H. & W. 324.

(*o*) Goodall v. Ray, 4 Dowl. 1.

(*p*) Hocken v. Grenfell, 4 Bing. N. C. 103.

SECTION VIII.

REFERRING THE AWARD BACK TO THE ARBITRATOR.

PART III. CH. IX. S. 8.

Formerly if an award were defective, the court could not, without consent, send it back to the arbitrator to amend it. They could only set it aside (*a*). But submissions now often contain a stipulation, "that in the event of either of the parties disputing the validity of the award, or moving the court to set it, or any part of it aside, the court shall have power to remit the matters referred, or any of them, to the re-consideration and determination of the arbitrator."

Clause to refer back "all matters or any of them."

Under a provision of this nature the court will refer back the award for the arbitrator to reconsider and amend, if he shall think fit; with a view to his correcting an error of form, such as the misnomer of the plaintiff in the cause referred (*b*); or they will shape an issue for the arbitrator's decision on the matter of fact which he has left uncertain (*c*).

Referring back to amend misnomer.

To decide particular question.

But if the clause be to refer back "the matters referred," without the words "or any of them," the court has no authority to direct the arbitrator to reconsider one point only, though the rest of the award be unimpeached; but all the matters must be sent back; consequently the whole case is opened, and the parties are entitled to offer fresh evidence respecting every question in dispute (*d*).

When all matters are sent back.

Where a cause in which *Joseph* Howett was plaintiff, was referred together with a cross action, and the arbitrator, by mistake in his award, awarded respecting a cause in which *James* Howett was plaintiff; on a motion to refer the award back to the arbitrator to allow him to correct the mistake,

Award purporting to be award in the cause.

(*a*) Kynaston v. Liddell, 8 Moore, 223; Cuerton, Ex parte, 7 D. & R. 774. See Phillips v. Hopwood, 1 B. & Ad. 619.

(*b*) Howett v. Clements, 7 M. & G. 1044.

(*c*) Nickalls v. Warren, 6 Q. B. 615.

(*d*) Nickalls v. Warren, 6 Q. B. 615; S. C. 9 Jur. 10. See P. 2, ch. 4, s. 1, d. 16, p. 198, duty of arbitrator on reference back.

an objection was taken that as the award was not an award in the cause referred, the court had no power to refer it back; but the court, observing that the clause empowering the court to refer back must be construed with some degree of liberality, made the order, as the affidavits showed that the award was intended as an award in the cause referred (*e*).

No reference back unless award bad.

It seems that under this provision the court has no authority to refer a case back to the arbitrator, unless the award be bad (*f*). It will not be referred back for an alleged mistake in law, which does not appear on the face of the award (*g*).

Arbitrator refusing to certify for costs.

When the arbitrator has the same power of certifying as a judge of Nisi Prius, the court will not interfere with the exercise of his discretion, or send the case back to him to reconsider his refusal to certify that the cause was brought to try a right (*h*).

Within what time to move to refer back.

It does not seem decided whether the time for moving to refer the award back is in all cases limited to the time within which application to set aside the award may be made; for where, after the time for setting aside an award had expired, Patteson, J., set aside the judgment for the plaintiff (which had been entered up pursuant to the arbitrator's certificate,) on the ground of its not being final; he intimated that possibly it might still be open to the plaintiff, to move to refer the certificate back to the arbitrator, under the clause for that purpose contained in the submission (*i*).

Whether court can refer back more than once.

After the arbitrator has amended his award, a fresh application may be made to set it aside, and if it be defective a second time, it will be again avoided (*k*). It is doubtful whether the clause gives the court the power to refer it back to the arbitrator more than once. The Court of Queen's

(*e*) Howett v. Clements, 7 M. & G. 1044.

(*f*) Webber v. Lee, 1 D. & L. 584.

(*g*) Fuller v. Fenwick, 3 C. B. 705.

(*h*) Bury v. Dunn, 1 D. & L. 141. See Nalder v. Batts, 1 D. & L. 700.

(*i*) Brooks v. Parsons, 13 L. J., Q. B. 50: S. C. 1 D. & L. 691.

(*k*) Nickalls v. Warren, 6 Q. B. 615; Howett v. Clements, 1 C. B. 128.

Bench declined to determine the point, where an arbitrator had so failed twice, as to render it unsatisfactory to send the case back again to him for a third decision, and set the award aside altogether (*l*).

Clause to refer back to same or different arbitrator.

Sometimes the clause is drawn up, empowering the court to refer the case back to the same arbitrator, "or to such other person as the court should think fit."

This seems an improvement on the clause as originally given above. For there may be many cases most fit to be determined by arbitration, in which there may be serious objections to having recourse again to the same arbitrator who has once miscarried; and in which, if the court had authority to send the parties summarily before a different arbitrator, the ends of justice would be best attained, and with the least expense and delay (*m*).

(*l*) Nickalls v. Warren, 6 Q. B. 615.

(*m*) Webber v. Lee, 1 D. & L. 584; Porch v. Hopkins, 1 D. & L. 881.

CHAPTER X.

SETTING ASIDE THE JUDGMENT ENTERED UP PURSUANT TO AN AWARD.

UNDER what circumstances the judgment entered up in the cause referred pursuant to the award may be set aside as void or irregular, is shortly stated in this chapter.

Contents of the tenth chapter.

Setting aside judgment.

If the plaintiff, pursuant to the award, enter up a verdict and sign judgment in the cause referred, the defendant may, within the time limited for setting aside awards, move to set aside both judgment and award, if the latter be defective. Thus the court will set aside a judgment signed pursuant to an award, if the arbitrator have no power to order judgment to be signed; but though the motion be to set aside both the judgment and award, the court will not set aside the award, if it be doubtful whether there be not a sufficient award, assuming the unauthorized direction as to the judgment rejected as surplusage (*a*).

When arbitrator no power to award judgment.

Judgment entered on reference by sheriff.

As the sheriff, on a trial by jury under a writ of trial, has no power to permit a verdict to be taken subject to a refer-

(*a*) Doe d. Body v. Cox, 15 L. J., Q. B. 317.

ence, the verdict and judgment entered pursuant to an award on a submission under such circumstances, will be set aside, but not necessarily the award itself, for that may be perfectly valid (*b*).

Setting aside judgment after time for setting aside award expired.

Although the time for setting aside the award may have long elapsed, the party is at liberty, as soon as the judgment has been signed, to move to set the latter aside; and on such a motion the court will determine the validity of the award on its face; for there is no other method than this, by which the defendant can contest the validity of the judgment (*c*). It is immaterial whether execution has been issued, or if issued, whether it has been executed. In the former case, the motion, it seems, is to set aside the judgment and to restrain the plaintiff from issuing execution (*d*); in the latter, to set aside the judgment and writ (*e*), and if a levy have been made, also to return the amount (*f*).

This step may be taken by the defendant, whether he has omitted to move to set aside the award itself (*g*), or having applied, has had his rule discharged (*h*).

The motion may be founded on the same ground of alleged defects apparent on the award on which a motion to set aside the award has been made and refused; for the court, we have seen, will not set aside the award, unless the objection be clearly good, and refuse to decide a doubtful point; but on the rule to set aside the judgment, the court are necessarily bound to come to a determination on the validity of the award, since refusing the rule has the effect of establishing the award (*i*).

Not for defects in award other

It is laid down as a clear principle, that for no other defects in the award than those apparent on its face can the

(*b*) Wilson v. Thorpe, 6 M. & W. 721; Harrison v. Greenwood, 15 L. J., Q. B. 92.

(*c*) Brooks v. Parsons, 1 D. & L. 691; Manser v. Heaver, 3 B. & Ad. 295; Doe d. Madkins v. Horner, 8 A. & E. 235; Wrightson v. Bywater, 3 M. & W. 199.

(*d*) Doe d. Madkins v. Horner, 8 A. & E. 235.

(*e*) Manser v. Heaver, 3 B. & Ad. 295.

(*f*) Wrightson v. Bywater, 3 M. & W. 199.

(*g*) Manser v. Heaver, 3 B. & Ad. 295.

(*h*) Wrightson v. Bywater, 3 M. & W. 199.

(*i*) Wrightson v. Bywater, 3 M. & W. 199.

judgment entered pursuant to it be impeached (*k*) after the time for setting aside the award has expired; yet in a late case, Patteson, J., set aside the judgment because the award, finding generally for the plaintiff, had omitted to find on each issue in the cause, though it does not appear from the report, nor is it probable that the award showed on its face that there was an issue left undetermined (*l*). The principle cited above does not seem to have been adverted to.

Judgment set aside for matter appearing other than shown on face.

It is no ground for setting aside the judgment signed for the defendant pursuant to the award, that before the award was made the plaintiff had become bankrupt (*m*).

Party bankrupt before award.

Though the award be good, if there be any irregularity in entering a verdict pursuant to the award, or in signing judgment or issuing execution, the court, on a proper application, will set aside the proceedings (*n*).

Irregularity in entering judgment.

It does not seem to have been decided with respect to a judgment entered pursuant to an award, whether the defendant be bound to apply to set it aside within a reasonable time after the entry of the judgment, but it is presumed that the same rule which applies in other cases holds here, namely, that if the award be void, and the judgment a nullity, no lapse of time is a waiver of the right to apply; but if the judgment be only irregular, application must be made in reasonable time, and before the party applying has taken any fresh step with knowledge of the irregularity (*o*).

When motion to set aside judgment to be made.

In one instance, where the Master had taxed the costs of the cause and reference and award together in one allocatur, and judgment had been signed for the whole, a motion was made to set it aside on the ground that the costs of the reference and award had been improperly included; the court treated it as an irregularity only, to which two answers

Signing judgment for costs of cause and reference, irregular.

(*k*) Manser v. Heaver, 3 B. & Ad. 295; Doe d. Madkins v. Horner, 8 A. & E. 235; Wrightson v. Bywater, 3 M. & W. 199; Macarthur v. Campbell, 2 A. & E. 52.

(*l*) Brooks v. Parsons, 1 D. & L. 691.

(*m*) Andrews v. Palmer, 4 B. & A. 250.

(*n*) Hayward v. Ribbans, 4 East, 309; Callard v. Paterson, 4 Taunt. 318.

(*o*) 2 Archb. Pract. 1044, 1045, 7th Ed.

were applicable in the particular case; namely, that there had been an unreasonable delay in making the application; and, secondly, that the defendant's attorney had distinctly assented to that mode of taxation, knowing that the judgment could only be entered for the whole amount of costs in the allocatur (*p*).

Whether requisite to state objections in rule nisi.

The rule of court which requires that objections shall be stated in the rule nisi on a motion to set aside the award, does not, it seems, apply to a rule nisi to set aside the judgment; and the objection intended to be relied on need not be specified therein, at least if it be one apparent on the face of the award (*q*).

(*p*) Bignall v. Gale, 3 M. & G. 858.

(*q*) Manser v. Heaver, 3 B. & Ad, 295.

CHAPTER XI.

IMPEACHING AN AWARD IN EQUITY.

THE present chapter treats of impeaching an award in equity.

Scope and contents of the eleventh chapter.

In its first section it examines into the jurisdiction of the Court of Chancery over awards, and the effect of the restrictions as to jurisdiction imposed by the statute 9 & 10 Wm. III. c. 15.

The second section remarks shortly on the grounds for which equity will hold an award void.

The third discusses the various modes of proceeding to set the award aside, by bill, by motion, or exceptions, and the circumstances under which the respective methods are available.

SECTION I.

IN WHAT CASES CHANCERY HAS JURISDICTION TO SET ASIDE AN AWARD.

PART III., CH. XI. S. 1.

Setting aside in equity award on submission by agreement.

When submission in an action at common law.

I. *When award not under the statute of William III.*]—The courts of equity have always exercised jurisdiction over awards, although the submission was by agreement out of court and incapable of being made a rule of court (*a*). This jurisdiction subsists at the present day.

On the reference of an action at Common Law, whether the submission be by order of a Judge, or order of Nisi Prius, or rule of a Court of Common Law, the Court of Chancery has undoubted authority to set aside the award, and to prevent a party taking advantage of its provisions in his favor. For when an order of reference of a cause depending in a court of law is made a rule of court, and application is made in the court of law to enforce the award, a court of equity considers the reference by rule of court merely as a proceeding in the court of law, modified and regulated by the consent of the parties; and whether the circumstance of consent to this mode of carrying on the suit may or may not be deemed worthy of consideration in equity, the mere fact that the parties have so far regulated the proceeding at law, can not bar the jurisdiction of equity to grant an injunction to restrain the proceeding to enforce the award at law, or to set the award aside. The statute 9 & 10 W. III. c. 15, does not in any way interfere with the ancient power of the courts of equity, when an action is referred, and the submission made a rule of court, not under the statute, but at common law (*b*).

Not affected by the statute of William III.

(*a*) Greenhill v. Church, 3 Rep. in Chanc. 49.

(*b*) Nichols v. Chalie, 14 Ves. 265; Nichols v. Roe, 3 M. & K. 431; Ld. Lonsdale v. Littledale, 2 Ves. Jr. 451; Brown v. Brown, 1 Vern. 157; Chuck v. Cremer, 2 Phill. 477.

Jurisdiction of Equity, submission made rule of law.

II. *When award under the statute of William III.*]— Much discussion has taken place respecting the jurisdiction of the Court of Chancery to set aside an award, made on a submission out of court, containing a clause for making it a rule of court under the statute 9 & 10 W. III. c. 15.

Early cases held equity has jurisdiction.

The first reported instance of a bill to set aside an award on a submission under the Act being brought in equity occurred in 1791. There a cause in Chancery having been referred by a submission which was made a rule of the Court of King's Bench, and the latter court having refused either to set aside the award or to enforce it by attachment; on the plaintiff's bringing a bill in Chancery to be relieved against the award, Lord Macclesfield, C., seems to have been of opinion that as the common law court had declined to exercise its jurisdiction under the statute, and had left the party on one side to his remedy by action, it left the other to take relief by bill in equity; and consequently he set the award aside (*c*).

In the next case in order of time the court entertained the jurisdiction, no question being raised, but dismissed the bill on the merits (*d*).

Very shortly after, however, the point as to the jurisdiction was taken: for in 1729, on a bill to set aside an award charging undue practice in the umpire, the defendant pleaded that the submission was under the statute of Wm. III., and had been made a rule of the Court of King's Bench; and the plea was ordered to stand for an answer, with liberty to except; but the cause does not appear ever to have been heard (*e*).

Concurrent jurisdiction of law and equity.

The opinion at that time prevailed that the Court of Chancery had a concurrent jurisdiction with the court of which the submission was a rule, to examine into the award on the ground of partiality of the arbitrator, within the

(*c*) Ward v. Periam, cited Chicot v. Lequesne, 2 Ves. Sr. 316; cited also in notes to Auriol v. Smith, 1 Turn. & R. 131.

(*d*) Reynell v. Luscomb, A. D. 1727, cited in Auriol v. Smith, 1 Turn. & R. 135, notes.

(*e*) Alardes v. Campbell, Bunb. 265; S. C. cited in Auriol v. Smith, 1 Turn. and R. 133, notes.

period limited by the Act (*f*); a view of the law which was countenanced in later times by the observations of Lord Eldon, in one of his early decisions on the statute (*g*).

In 1735, on a bill to set aside the award, where the submission was made an order in Chancery, after the award had been made, the defendant objected, that the time given by the statute having elapsed, the bill would not lie: but Lord Talbot, C., was of opinion, that to be within the statute the confirmation of the submission must be prior to the award: and that as to the time, it was impossible for the party to apply within the term after the award was made, because the submission had not been made a rule of court within that time: he therefore set aside the award (*h*).

A bill to set aside an award, on a submission under the statute made a rule of the Court of King's Bench, having been brought, alleging corruption and fraud of the arbitrators, and the defendant having pleaded the award in bar, and insisted that it was a fair award; Lord Hardwicke, C., in 1740, ordered the plea to stand for an answer, with liberty to except, and said he only remembered one instance of a bill brought for such a purpose, which was *Ward's* case, (cited previously as *Ward* v. *Periam*) (*i*).

On a like submission, in 1751, a similar bill charging the arbitrator with misconduct, the same judge expressed his determination to follow the precedent of *Ward's* case, and to make the arbitrator pay costs, if proved partial (*k*).

And Lord Loughborough, C., in 1794, when deciding that a reference by order of Nisi Prius was not a reference under the statute, expressly stated his opinion that the jurisdiction of Chancery was not barred by a reference under the statute (*l*).

Later cases show equity no jurisdiction.

At the commencement of the present century, however, different views prevailed, and in 1803, on a bill to set aside

(*f*) Alardes v. Campbell, Bunb. 265.

(*g*) Fetherstone v. Cooper, 9 Ves. 67.

(*h*) Spettigue v. Carpenter, 3 P. W. 361; S. C. Vin. Ab. Supp. Arb. p. 301.

(*i*) Kampshire v. Young, 2 Atk. 155.

(*k*) Chicot v. Lequesne, 2 Ves. Sr. 315.

(*l*) Lord Lonsdale v. Littledale, 2 Ves. Jr. 451.

an award, when the submission was made a rule of a court of common law under the statute, Lord Eldon, C., declining to say whether the jurisdiction of Chancery was shut out by the act, dissolved an injunction, where the objections to the award were such, as might have been equally well raised in the court of which the submission was a rule.

Though submission not made rule before award made.

He held also that it was of no consequence, that the submission had not been made a rule of court till after the award had been made (*m*). Lord Talbot, C., as we have seen in an earlier case, expressed a different opinion (*n*), but the invariable practice of all the courts at the present day is in accordance with Lord Eldon's view.

In 1807, on a general reference by parties in a suit in Chancery, where the submission was made a rule of the Court of King's Bench, Lord Eldon, C., expressed great doubts, whether the statute did not deprive the party of the power to file a bill in Chancery to set aside the award for a mistake in law apparent on its face (*o*); and very shortly after, in a case of a similar character, after consulting some of the judges, he expressly decided that the statute confined the jurisdiction over the award to that court only, of which the submission was a rule (*p*).

Though submission not made rule until after bill filed.

This decision has been assented to as undoubted law ever since. But in 1816 Sir T. Plumer, V. C., agreeing that if the submission had been made a rule of another court, Chancery could not have acted, took the distinction, that a bill would lie, if the submission had not been made a rule; and held that the mere agreement to make the submission a rule of court was unimportant, unless it was actually so made, and that it was the same as if there had been no clause for that purpose (*q*).

In the next reported case on the subject (in 1820) the correctness of this view seems to have been assumed on one side, and tacitly admitted on the other (*r*).

(*m*) Fetherstone v. Cooper, 9 Ves. 67.

(*n*) Spettigue v. Carpenter, 3 P. W. 361. See ante, p. 668.

(*o*) Nichols v. Chalie, 14 Ves. 265.

(*p*) Gwinett v. Bannister, 14 Ves. 530.

(*q*) Steff v. Andrews, 2 Madd. 6.

(*r*) Goodman v. Sayers, 2 J. & W. 249.

Subsequently, however, in 1823, though the bill was not filed until after the time for setting aside the award in the court of common law had expired, Sir J. Leach, V. C., dissented from the view entertained by Sir T. Plumer in *Steff* v. *Andrews* (*s*), and held that the omission of the party to make the submission a rule could not give that court power over it, and defeat the limitation of time imposed by the statute (*t*).

This decision was shortly (in 1824) followed by another, in which the same judge, Sir J. Leach, V. C., held that Chancery had no jurisdiction by *bill*, though the submission contained a clause for making it a rule either of the Court of King's Bench or of Chancery, and though it was contended that filing the bill in Chancery was equivalent to making it a rule of that court: the submission was in fact made a rule of the Court of King's Bench by the defendant between the filing of the bill and the motion for an injunction (*u*).

The decisions of Sir T. Plumer and Sir John Leach being thus diametrically opposite, still left open the question, as to the effect of making the submission a rule of a court of common law, after a bill had been filed in Chancery to set aside the award (*x*).

In a subsequent instance, where the submission had not been made a rule of the common law court before the bill was filed, Shadwell, V. C., (in 1833,) agreeing with Sir T. Plumer, overruled a demurrer to the bill, on the ground that the original inherent jurisdiction of the Court of Chancery was not taken away, except when the submission had been actually made a rule of another court before the bill was filed; and though the submission had been made a rule of the Court of King's Bench before the plaintiff obtained an injunction, the Vice-Chancellor refused to dissolve it on that account; holding that the Court of Chancery having once acquired jurisdiction before the submission had been made

(*s*) 2 Madd. 6.
(*t*) Davis v. Getty, 1 S. & S. 411.
(*u*) Dawson v. Sadler, 1 S. & S. 537.
(*x*) —— v. Mills, 17 Ves. 419.

a rule, still retained it (*y*). On appeal, however, against the order granting an injunction, Lord Brougham, C., overruled the above decision, pronouncing that the statute would be repealed in its most express provision, if the jurisdiction still resided in that court, after the parties had agreed to make the submission a rule of another court; and that the fact of whether or not it had been so made a rule before the filing the bill was immaterial (*z*).

Submission to be rule of Chancery, no jurisdiction by bill.

In a very recent case, (decided in 1846,) where a bill was filed to set aside an award, made on a submission by agreement out of court referring a suit in Chancery and all matters in difference, and containing a provision that the submission and award might be made a rule of the Court of Chancery; the submission not having been made a rule of court, Shadwell, V. C., overruled a demurrer to the bill on the same ground that he took in *Nichols* v. *Roe* (*a*); namely, that the submission not having been made a rule of court, the jurisdiction of Chancery remained. But Lord Cottenham, C., on appeal, reversed the decision, holding that it had already been solemnly settled in *Nichols* v. *Roe* (*b*), that the filing the bill before the submission had been made a rule was no matter of importance; and that he fully approved of that construction of the statute, and would do nothing to disturb that decision: since it was impossible not to see that it was the intention of the act, that the award should be set aside only by that court, of which the submission was a rule; and that as it was now clearly decided that the jurisdiction of Chancery was altogether excluded, when the submission was to be made a rule of another court; so when it was to be made a rule of the Court of Chancery, he held that that court had jurisdiction to set the award aside, only in the summary manner pointed out by the act, and not by *bill*, at least when the proceeding by *motion* was equally efficient (*c*).

(*y*) Nichols v. Roe, 5 Sim. 156.
(*z*) Nichols v. Roe, 3 M. & K. 431.
(*a*) 5 Sim. 156.
(*b*) 3 M. & K. 431.
(*c*) Heming v. Swinnerton, 1 Coop. C. C. 386.

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Equity no jurisdiction for fraud.

No circumstances can give the Court of Chancery jurisdiction, when the agreement is, that in pursuance of the statute the submission shall be made a rule of a court of common law (*d*).

On several occasions it was contended that the statute did not intend to take away the jurisdiction, when there was fraud on the part of the arbitrators or the parties, but Sir T. Plumer, V. C., Lord Eldon (*e*), and Sir John Leach, V. C. (*f*), all concur in holding that the statute permits no special exception on this ground.

SECTION II.

FOR WHAT GROUNDS EQUITY WILL SET ASIDE AN AWARD.

Grounds in equity same as at common law.

As there seems in most cases to be no substantial distinction between the courts of law and equity as to the grounds on which awards may be set aside in each (*a*); to avoid repetition the general enumeration of the grounds on which an award may be successfully impeached, is confined to the chapter on setting aside awards on motion (*b*); and the points now considered are those only, which for some cause or other are more particularly connected with proceedings in equity.

Grounds open varying with form of submission.

In an old case, before the statute of William III., on a bill to be relieved against an award on a submission by bond, the court said they would neither confirm nor over-

(*d*) Yates v. Barnard, cited in Heming v. Swinnerton, 1 Coop. C. C. 422, notes. per Sir J. Leach, V. C.

(*e*) Auriol v. Smith, 1 Turn. & R. 121.

(*f*) Dawson v. Sadler, 1 S. & S. 537.

(*a*) Lingood v. Eade, 2 Atk. 501; R. v. Wheeler, 3 Burr. 1257.

(*b*) See P. 3, ch. 9, s. 3, p. 627.

throw such awards, unless circumvention or corruption were proved. But otherwise if the award were made by order of court (*c*).

Varying with object of bill impeaching award.

It is said that on a bill to set aside an award, and nothing more, the Court of Chancery will not let the party go into any legal objections, except the grounds of partiality and corruption; but if the bill be for an account, and pray to set aside the award in order to let in such account, that then the plaintiff is at liberty to make legal objections (*d*). Lord Hardwicke, C., lays it down, that when a bill is filed to set aside an award, and for an account, as the plaintiff is entitled to an account unless the award be a bar, the court will enter into all the legal objections against the award, which a court of law would have done, it being insisted on by the plea to prevent a general account (*e*).

For what grounds award made in action set aside.

An action for the balance of an account was referred at Nisi Prius, subject to the certificate of an arbitrator. The arbitrator having certified in favour of the plaintiff for a specified sum, the defendant filed a bill in Chancery to set aside the award, on the ground that the arbitrator had received in evidence a certain account as an account stated, without sufficient evidence of its possessing that character; that he had acted on it, declining to call for the books containing accounts of prior transactions; and that he had refused to give the defendant credit for payment of certain sums, paid in respect of the transactions covered by the account, though not included in it. The bill also alleged fraud in the plaintiff at law, and misconduct in the arbitrator, but no attempt was made to prove either charge. An injunction had been granted by the V. C. to prevent the plaintiff at law issuing execution on the judgment. Lord Cottenham, C., dissolved the injunction, on the ground, that it was clearly within the arbitrator's jurisdiction to decide whether the account produced were a settled account conclusive between the parties, and that the plaintiff in equity had

(*c*) Greenhill v. Church, 3 Rep. in Chanc. 49, 89.

(*d*) Champion v. Wenham, Amb. 245.

(*e*) Lingood v. Eade, 2 Atk. 501.

failed to show his title to credit for the sums which the arbitrator had refused to take into account. He also said, that he had disposed of the case on the facts, as in the state of the authorities as to the extent of the jurisdiction of Chancery, disposing of it on the point of law would hardly be satisfactory; but he added, "what is there to give to a court of equity any peculiar jurisdiction in case of a judgment founded upon such an award, which it would not have had if it had been founded upon a verdict?" "That failure at law from the errors of the judge, or the jury, or in the conduct of the cause, will not *per se* give this court jurisdiction, is certain: does a different rule prevail where the failure is attributable to any conduct in the arbitrator" (*f*)?

Exchequer not review award by order of Chancery.

It has been decided that no bill would lie on the equity side of the Exchequer to review the decision, on points of law and fact, of an arbitrator appointed on a submission by order of Chancery (*g*).

Assignee of judgment bond bound by award.

Upon a bill by the assignee of a judgment against the conusor, stating an award, in which a certain sum was found due upon the judgment, and praying that accounts might be taken against the conusor, upon the footing of the award and the judgment; the defendant, the conusor, cannot by his answer impeach the award, and raise questions which have been discussed before, and decided by the arbitrators, as to the state of the accounts between the defendant as conusor and the conusee of the judgment (*h*).

Award conclusive as to all within scope of submission.

The fact, that after the award mutual releases have been executed, will not necessarily preclude inquiry into its validity (*i*). But if an award be made on a reference of all matters in difference, a party, after receiving the money awarded, and executing a general release, and acquiescing in the award for some years, will not, on a suggestion that the arbitrator has decided on one matter only, be permitted to maintain a bill against his opponent for a general account of all other transactions except what relates to that one matter (*k*).

(*f*) Chuck v. Cremer, 2 Phill. 477; S. C. 17 L. J. Ch. 287.
(*g*) Pitcher v. Rigby, 9 Price, 79.
(*h*) Hill v. Ball, 2 Bligh, N. S. 1.
(*i*) Morgan v. Pindar, 3 Rep. in Chanc. 76.
(*k*) Jones v. Bennett, 1 Bro. P.C. 528.

Though no bill lies to set aside an award on a question of fact decided by the arbitrators, yet evidence of the merits will be let in, so far as it throws light on their conduct (*l*).

When evidence of merits let in.

Commissioners appointed by statute to ascertain the bounds, and fix the rent payable to the crown for certain mines, made an award, giving a benefit to a miner, on the faith of his having agreed to pay a sum for certain bygone workings of the mine. The commissioners were not authorized by the statute in imposing on the miner such condition of payment. The miner having refused to comply with the supposed terms, an information was filed in Chancery, at the suit of the crown, with a view to enforce payment, or to set the award aside, on the ground of fraud and mistake: but the court being of opinion that the miner had never entered into the agreement, though the commissioners mistakenly supposed that he had, held the claim for the payment not maintainable on the facts; and they also refused to set aside the award, there being no fraud shown; since, as the time limited by the act for making the award had expired, the miner, if the award were set aside, would lose the whole benefit of the Act of Parliament, without any fault of his own, on account of a mistake of the commissioners (*m*).

Award under statute made on mistake.

SECTION III.

WHAT THE MODES OF PROCEEDING TO SET ASIDE AN AWARD IN EQUITY.

1. *Proceeding by bill to set aside an award.*]—When the submission is by judge's order, order of Nisi Prius, or rule

Submission not under the statute, bill lies to

(*l*) Goodman v. Sayers, 2 J. & W. 249, 259.

(*m*) Attorney General v. Jackson, 5 Hare, 355.

set aside award.

of a court of common law, or by private agreement not under the statute of William III., the proceedings to set aside the award must be by bill (*a*).

After a reference on the trial of an issue directed out of Chancery, the jurisdiction of Chancery over the suit is at an end, and the court cannot direct a new trial of the issue though the party be dissatisfied with the award. If, however, the award be objected to on the ground of corruption in the arbitrators, the facts may perhaps be brought before the court by a supplemental bill (*b*).

Bill must particularize objections to award

In a bill to set aside an award the particular ground on which it is sought to impeach it ought to be charged with all its circumstances (*c*)

An award made on a submission by agreement between the plaintiff and defendant, who were partners, appointed persons in the nature of receivers to collect and pay the debts of the firm, and to pay over the surplus in moieties to the plaintiff and defendant.

The plaintiff filed a bill, which stating the award, and that there was a deficiency in the funds, and that several demands had been enforced by creditors against him, prayed contribution from the defendant, and an account generally. The defendant pleaded the award, and the court allowed the plea, as the bill did not state as a specific objection to the award that it was not final, for not having provided for a deficiency of assets, or set forth the deficiency, or show what debts the plaintiff had been forced to pay (*d*). On a rehearing, it appeared that by the award the plaintiff was to be at the risk of all debts incurred after a certain day, on which day the partnership was awarded to end. Though the bill stated that the debts in respect of which contribution was sought were incurred by the partnership, the court thought this might apply to debts incurred after the day, for as between creditors and the firm the partnership still exist-

(*a*) Greenhill v. Church, 3 Rep. in Chanc. 49, 89; Lord Lonsdale v. Littledale, 2 Ves. Jr. 451.

(*b*) Woodley v. Johnston, 1 Molloy, 394.

(*c*) Tittenson v. Peat, 3 Atk. 529

(*d*) Routh v. Peach, 2 Anst. 519.

ed; and that as the arbitrators had proceeded on a supposition that the partnership effects were sufficient to pay all demands up to that time, the court would presume the supposition well founded until it was expressly negatived: and so the order allowing the plea was affirmed (*e*).

Pleading the award in bar.

The effect of the award itself as a plea in bar to the bill to set it aside, the averments which the plea must contain, and how it must be supported by an answer, have been already considered in the section treating of an award as a defence in equity (*f*).

What a ground of demurrer to the bill.

If the bill to set aside the award impeach it on grounds which the court cannot entertain, as for instance, that the arbitrator has come to a wrong decision on the matters referred; demurring to the bill is the proper mode of questioning the sufficiency of the objections (*g*).

Party proceeding at law no ground of demurrer.

It is not a cause of demurrer to a bill to set aside an award, charging collusion and corruption of the arbitrator, that the parties have proceeded in a court of law, and that there would be a remedy in that court; for the proceeding under the authority of the court of law may be perfectly incompetent; since that which would subvert the award may arise out of the answers in equity, and there is a great difference in compelling that discovery in answer to pointed interrogatories from affidavits at law, where the parties cannot be pressed to make a full answer (*h*). We have previously seen, that in such case the arbitrator, if made a defendant, cannot demur (*i*).

In an old case, on a demurrer to a bill to be relieved against an award for excessive damages given, it was ordered that the defendant should answer, but the benefit of the demurrer should be saved to the hearing (*k*).

When arbitrator to be made a defendant.

In investigating the extent of the personal liability of the arbitrator, we have seen that he may be made a defendant

(*e*) Routh v. Peach, 3 Anst. 637.
(*f*) See P. 3, ch. 4, s. 2, p. 531.
(*g*) Pitcher v. Rigby, 9 Price, 79.
(*h*) Lord Lonsdale v. Littledale, 2 Ves. Jr. 451.
(*i*) See P. 2, ch. 9, s. 3, p. 441.
(*k*) Younge v. Cooke, 3 Rep. in Chanc. 45, 82, A. D. 1673.

to a bill to set aside an award, when charged with corruption or gross misconduct, with a view to fix him with payment of costs (*l*).

Answer of arbitrator read against co-defendant.

When the arbitrators are properly made parties to a bill to be relieved against an award on a suggestion of misbehaviour on their part, according to Lord Northington, C., it is a notorious fixed rule, that the plaintiff is entitled to read their answer against their co-defendant interested in the award, who contends that the award ought to be supported (*m*).

Submission by order of Equity, award set aside on motion.

II. *Proceeding by motion to set aside an award.*]—If the reference be by order of the Court of Chancery made in a suit depending in that court, the usual and proper method of impeaching the award is by motion supported by affidavits (*n*).

Submission under statute, award set aside on motion.

On a reference under the statute of William III.(*o*), when the submission provides for its being made a rule of Chancery, in ordinary cases, it is clear, that the proceeding by motion summarily, according to the provisions of the Act, is the only available course (*p*). Even when the subjects of reference include a suit in Chancery, Lord Cottenham, C., has decided, that that court has no jurisdiction by *bill*, when the objections are such, as can be as conveniently and effectually discussed in the former method of proceeding. He, however, guarded himself against deciding that a case might not arise in which the proceeding by bill could be admissible (*q*).

Notice of motion.

Before an application be made to the court to set aside an award, the submission must be made an order of court (*r*),

(*l*) See P. 2, ch. 9, s. 3.

(*m*) Rybott v. Barrell, Coxe MSS. Linc. Inn; S. C. 2 Eden, 131; cited also 1 Coop. C. C. 383; Steward v. East India Company, 2 Vern. 380, contrâ.

(*n*) Crawshay v. Collins, 3 Swanst. 90; S. C. 1 Wils. C. C. 31; Dick v. Milligan, 2 Ves. Jr. 23.

(*o*) 9 & 10 W. III. c. 15.

(*p*) Dawson v. Sadler, 1 S. & S. 537.

(*q*) Heming v. Swinnerton, 1 Coop. C. C. 386; 2 Phill. 79.

(*r*) See P. 3, ch. 5, s. 2, p. 551.

and a notice of motion to set aside the award must be given. The motion may be made on the usual days in term or out of term, and, by special leave of the court, on other days also. This leave may be obtained on an ex parte application (*s*).

Motion in term or out of term.

It is not usual, nor is it necessary, that the notice of motion should state the grounds on which it is sought to impeach the award.

Grounds of motion need not be stated.

It is to be observed, that where the award is under a submission, other than by order of court made in a suit, that the affidavits to be used on the motion should be entitled "In the matter of the arbitration between [the parties], and in the matter of [the Act giving the court jurisdiction over the award]" (*t*).

Entitling affidavits.

This notice of motion may be given, and come on to be heard, as a cross motion with the motion to make the award an order of court (*u*).

Cross motion.

On the motion coming on, the application will be rejected, or the award set aside, according to the judgment of the court (*x*).

Hearing the motion and judgment.

It may here be mentioned, that on a motion to set aside an award, when the submission has been made an order of the Court of Chancery under the statute, the order of that court confirming the award is final, and is not subject matter of appeal to the House of Lords (*y*).

No appeal against the decision.

A mode of impeaching awards novel to the Court of Chancery was adopted in the following case.

Order nisi to set aside award.

A party being desirous of setting aside an award made under the Lands Clauses Consolidation Act, giving him compensation for his land which was taken for the purposes of a railway, applied to V. C. K. Bruce for an order *nisi* to set the award aside. No notice of motion had been given. The

(*s*) 2 Daniell's Chanc. Pract. by Headlam, 1453; Smith's Hand Book of Chanc. Pract. 58.

(*t*) Re Law, 4 Beav. 509,

(*u*) Wilkinson v. Page, 1 Hare, 276.

(*x*) 2 Daniell's Chanc. Pract. by Headlam, 1459; Smith's Hand Book of Chanc. Pract. 60.

(*y*) O'Sullivan v. Hutchins, cited in Bignold v. Springfield, 7 C. & F. 85; 2 Daniell's Chanc. Pract. by Headlam, 1356, 1357.

grounds alleged for the application were the following:—The award was executed on the 23rd of Sept. 1847, and the application to the court was not made until the 24th of November, the last day but one of Michaelmas Term, and the latest day on which a motion could be made to set aside the award, on the assumption that the time for such an application was limited by the statute of William III.: that, consequently, if they had waited to serve the usual notice of motion, it would have been too late. The V. C., K. Bruce, under the circumstances, granted an order that the award should be set aside, unless cause were shown on or before a certain day. The merits were not at all gone into, and the order was granted for what it was worth, the V. C. leaving to the other side to impugn the proceeding, if they thought fit. Cause was shown, and the award ultimately sustained, but no question was raised on showing cause as to the propriety of the granting the order nisi (*z*).

Old practice filing exceptions to award.

III. *Filing exceptions to an award in a suit.*]—When matters in a suit were referred to an arbitrator by an order of Chancery made by consent in the cause, according to the ancient practice, the arbitrator was looked upon in much the same light as a Master; his award was considered as little conclusive as a Master's report, and orders to confirm awards were as necessary as orders to confirm reports (*a*). It was, moreover, prescribed, that the award ought to be filed and confirmed, before the party could ground any order on it, and that after it was filed, and an order to confirm it *nisi* obtained, the other side was at liberty to file exceptions to it, which were to be decided on argument (*b*). Now, however, since the decision of the arbitra-

Present practice no

(*z*) Elliot v. South Devon Railway Comp., V. C. Knight Bruce, Nov. 24, 1847, ex relatione of an officer of the Registrar's Office. See case reported 12 Jur. 446, ante, p. 109. See Appendix for the form of the order nisi.

(*a*) Crawshay v. Collins, cited in Heming v. Swinnerton, 1 Coop. C. C. 419, notes; S. C. 3 Swanst. 90; 1 Wils. C. C. 31; 1 Swanst. 40.

(*b*) Vernon v. Wells, 2 Dick. 452; Crofton v. Connor, 1 Bro. P. C. 530; Cresly v. Carrington, 1 Vern. 469; Hide v. Cooth, 2 Vern. 109.

tor is looked upon as that of the court, and held to be final, the practice is changed; and exceptions can no longer be taken to an award, except, probably, in the rare cases, where the arbitrator is expressly substituted for the Master to take the accounts in the cause like that officer (*c*).

exceptions but when arbitrator put for Master.

(*c*) Crawshay v. Collins, 3 Swanst. 90; S. C. 1 Wils. C. C. 31; 1 Swanst. 40; 1 Coop. C. C. 419, notes; Woodbridge v. Hilton, 2 Dick. 640; S. C. 1 Bro. C. C. 398; Price v. Williams, 3 Bro. C. C. 163; Knox v. Symmonds, 1 Ves. Jr. 369; Dick v. Milligan, 2 Ves. Jr. 23; S. C. 4 Bro. C. C. 117, 536; Ford v. Gartside, 2 Cox, 368.

CHAPTER XII.

EFFECT OF THE FAILURE OF THE REFERENCE.

Scope and contents of the twelfth chapter.

As it is evident, from what has been already said respecting the results of a reference become ineffectual from no award having been made, or, if made, from its having been condemned as invalid, that the matters submitted to the arbitrator are in general left in the same position, as if no reference had ever taken place; it is sufficient in this concluding chapter respecting the consequences of an abortive arbitration, to narrow our observations to the one or two points which yet require an explanation: namely—,respecting the effect of the failure of the reference on the action or suit referred, which is noticed in section one; and the question treated of in the second section,—whether equity will decree specific performance of a contract, whose terms were to have been settled by an arbitration, which has become fruitless.

SECTION I.

THE REFERENCE FAILING, PROCEEDING IN THE CAUSE REFERRED.

Reference failing, action proceeds.

When an action at law is referred, and the reference proves abortive, either from no award having been made, or if made, from its having been afterwards set aside; the parties may go on with the proceedings in court, unless it were stipulated in the agreement of reference, or agreed to at the time of the submission, that the cause should be terminated (*a*).

When juror withdrawn.

Withdrawing a juror on a submission at Nisi Prius does not of necessity put an end to the cause. If the reference fail, the plaintiff is not concluded in the action, unless the cause were abandoned by consent. The parties may, however, consent not only to give up the cause, but to preclude themselves from bringing a fresh action for the same matter (*b*).

When verdict taken new trial on failure.

When a verdict has been taken on a submission at Nisi Prius, and the reference has failed, either from the arbitrator's refusal to accept it, or his omission to enlarge the time (*c*), or his death (*d*), or from the order of reference being annulled (*e*), or from the award being set aside, or from other causes (*f*), and the parties do not agree to a second reference; the ordinary course, as the case has never been decided, is, to send it down again for a new trial. Where an action by an infant plaintiff (suing by his next friend) was referred before trial by verbal agreement, and the record was withdrawn, and the arbitrator awarded in favor of the defendant, and

Infant plaintiff avoiding award.

(*a*) Lowes v. Kermode, 8 Taunt. 146; Harries v. Thomas, 2 M. & W. 32.

(*b*) Harries v. Thomas, 2 M. & W. 32; Moscati v. Lawson, 1 H. & W. 572.

(*c*) Hall v. Phillips, 9 Bing. 89.

(*d*) Harper v. Abrahams, 4 Moore, 3.

(*e*) Morgan v. Miller, 6 Bing. N. C. 168.

(*f*) Bacon v. Cresswell, 1 Hodges, 189; Thompson v. Jennings, 10 Moore, 110.

directed the plaintiff to pay all costs; the court directed that on the plaintiff's refusal to abide by the award and to comply with its terms, the defendant should be at liberty to proceed to trial in the action by proviso (*g*).

When the award is set aside, the first verdict taken subject to the reference is impliedly set aside as well, although the rule to set aside the award is silent respecting the verdict.

Before new trial first verdict must be set aside.

But when the reference fails before an award is made, and the plaintiff wishes to proceed in the cause; before a new trial is had, the verdict taken by consent subject to the reference, and already entered on the Nisi Prius record, or standing in the associate's book, must be set aside; for a second verdict will be considered irregular while the first remains, unless, indeed, the irregularity have been waived by both parties (*h*).

Verdict on writ of trial subject to reference.

If the verdict be taken subject to the reference, on the trial of a cause on a writ of trial, the plaintiff must get rid of the verdict before he takes the cause down to trial again; for the verdict is not a nullity, though the under-sheriff has of himself no authority to refer the cause (*i*).

Award set aside costs of first trial.

When an award is set aside, the case is analogous to that of a venire de novo, and whatever difference of practice existed formerly, it is now settled, that if the rule be silent as to costs, the party for whom the verdict was entered subject to the reference, will not be entitled to the costs of the first trial, though he succeed on the second (*k*).

Compelling defendant to refer again.

Sometimes, instead of the cause being sent down to a new trial, the jurisdiction which the court retains over the verdict will at the instance of the plaintiff be exercised, to compel the defendant to submit the case again to the same or a

(*g*) Godfrey v. Wade, 6 Moore, 488.

(*h*) Hall v. Rouse, 6 Dowl. 656; Evans v. Davies, 3 Dowl. 786.

(*i*) Harrison v. Greenwood, 15 L. J., Q. B. 92; S. C. 3 D. & L. 353.

(*k*) Wood v. Duncan, 5 M.& W. 87; Reg. Gen. H. T. 2 W. IV. r. 64, rep. 8 Bing. 297; 3 B. & Ad. 383; 1 M. & Scott, 424; 2 C. & J. 85; 2 Tyrw. 346; Payne v. Bailey, 7 Moore, 147; S. C. 3 B. & B. 304; Poole v. Selwood, 1 Price, 310; Summers v. Formby, 1 B. & C. 100; Burchall v. Ballamy, 5 Burr. 2698.

fresh arbitrator. When the plaintiff is entitled to some damages, and the only question is respecting the amount, the court will allow the plaintiff to enter judgment and sue out execution for the amount of damages taken on the verdict by consent, (though some indulgence will sometimes be given to the defendant's bail,) if on the first reference failing the defendant refuse to consent to a new arbitration; for the legal liability has been already decided in favor of the plaintiff, and so the failure of the reference does not entirely reopen the cause (*l*). Such seems now to be the settled rule, though the first time such an application was made, the court seemed startled by the novelty, and refused it, notwithstanding the defendant had acted contrary to good faith: the court, however, delivered the postea to the plaintiff, with liberty to enter a verdict reducing the amount of damages to a shilling (*m*).

When only amount of damages referred.

The cases as reported do not seem quite consistent, as to the extent of power which the courts retain over the verdict.

Even when the submission includes the general merits of the case, and not merely the amount of damages, the Court of Queen's Bench, on the reference failing, assert the *power* of directing judgment to be entered up and execution to issue for the full amount of the verdict taken, unless the defendant will enter into a new submission; though it is a matter of *discretion*, when the court will exercise the power (*n*).

When cause referred generally.

Where the arbitrator allowed the original time to elapse without enlargement, the court considering the reference beneficial, thus compelled the defendant to consent to a fresh enlargement (*o*). They refused, however, thus to compel a reference, but sent the case down to a new trial, where, through neglect of the plaintiff's attorney, the time for making the award had elapsed before the order of reference

(*l*) Evans v. Davies, 3 Dowl. 786; Woolley v. Kelly, 1 B. & C. 68; Taylor v. Gregory, 2 B. & Ad. 774.

(*m*) Harper v. Abrahams, 4 Moore, 3.

(*n*) Wilkinson v. Time, 4 Dowl. 37; Porch v. Hopkins, 1 D. & L. 881.

(*o*) Wilkinson v. Time, 4 Dowl. 37.

had been delivered to the arbitrator (*p*). Nor would they send a case back to the arbitrator, where one award had been made and afterwards set aside as defective, for the defendant might reasonably have no confidence that a second award of the same arbitrator would be more valid (*q*).

The Court of Exchequer, however, seem to be opinion, that when a general reference proves abortive, they have no power over a defendant to force him to refer again, and consequently cannot exercise a discretion (*r*).

Plaintiff refusing to refer court not enter verdict for defendant.

If the defendant be the party who presses for a fresh recourse to arbitration, and the plaintiff refuse to agree, the case must go down to a new trial; for though the court can set aside the verdict entered for the plaintiff, they have no authority to allow a verdict to be entered for the defendant (*s*).

Reference failing, suit in equity proceeds.

Similar to the rule in law is the practice in equity. For there, when a suit is referred, and the reference proves abortive, the suit proceeds as if there had never been a recourse to arbitration (*t*). There is sometimes in orders of Chancery referring a suit, a provision "that any of the parties are to be at liberty to apply to the court as they shall be advised." This reserved liberty extends two ways. It authorizes, if an award be made, proceedings on the award, and if the arbitration do not proceed, an application as if the reference had not been made (*u*).

Clause, reserved liberty to apply.

(*p*) Doe d. Fisher v. Saunders, 3 B. & Ad. 783.

(*q*) Porch v. Hopkins, 1 D. & L. 881.

(*r*) Burley v. Stephens, 1 M. & W. 156; Evans v. Davies, 3 Dowl. 786; Chesalyn v. Dalby, 2 Y. & C. 170.

(*s*) Cottam v. Partridge, 2 M. & G. 843.

(*t*) Cooth v. Jackson, 6 Ves. 11; Crawshay v. Collins, 3 Swanst. 90.

(*u*) Crawshay v. Collins, 3 Swanst. 90.

SECTION II.

ENFORCING IN EQUITY A CONTRACT DEPENDENT ON AN ABORTIVE REFERENCE.

No bill when submission of essential terms and no part performance.

A submission to arbitration is often made respecting some of the terms of a contract, as, for instance, for the sale or lease of lands. When the arbitrators are to decide that which is of the essence of the contract, and they fail to do so, and there has been no part performance, neither the submission nor the contract can be carried out in equity.

Reference failing, equity not divide estate or fix purchase price.

The Court of Chancery cannot be substituted for the arbitrators to make a division of an estate (*a*). On the like principle, when estates are to be sold at a price to be fixed by arbitrators, and they cannot agree in their valuation, or in the appointment of an umpire, the Court of Chancery will refuse to direct the Master, or any other person, to ascertain the price, and compel the intended purchaser to take the estate at that price; because his only agreement is, to take it at a price ascertained in a specified mode, and to make him take it at a price determined in any other way, would be to make him do something, which he had never agreed to do. For the price is the very essence of a contract of sale, and when the arbitrators do not fix it there is no contract. The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value is pointed out, and there is nothing, therefore, precluding the court from adopting any means adapted to that purpose (*b*).

Even where the arbitrators had agreed on their award, and put down the terms in writing, but one of the parties died before they had executed the award, and thus consequently revoked their authority, the Court of Chancery re-

(*a*) Cooth v. Jackson, 6 Ves. 11. Pritchard v. Ovey, 1 J. & W. 396.
(*b*) Milnes v. Gery, 14 Ves. 400;

fused to enforce the contract according to the price which the arbitrators had agreed to allow (*c*).

Contract enforced when submission not of essence and part performance.

But if the matter of the submission be not of the essence of the contract, and especially if there have been a part performance, a court of equity will enforce the contract, notwithstanding the reference has been ineffectual. Thus, where a party, who had conveyed certain estates as security for a debt, the amount of which was to be ascertained by arbitration; on the reference failing by the death of the arbitrator, took proceedings in equity to have his lands reconveyed to him; the court referred it to the Master to ascertain the amount of the charge (*d*). So also where a clause in a contract provided that the terms of a lease, to be granted by one party to the other, were to be settled by a person named; the court being of opinion that the agreement was binding and concluded, and such as ought to be carried into execution, and that the agency of that particular individual was not of the essence of the contract, but only connected with matter of detail, decreed a specific performance, and directed the Master to settle the terms of the lease (*e*).

When submission not of essence.

When part performance though submission of essence of contract.

If there have been a part performance of the contract, though the submission which fails be respecting the price, it will sometimes be enforced, and the duty of the arbitrator undertaken by the court. When a party agreed for a lease of certain lands, the rent to be fixed by arbitration, and entered into the lands and held possession of them many years, and expended money on them; the reference proving abortive, the Court of Chancery referred it to the Master to ascertain what the fair rent should be (*f*).

Act of arbitrator not part performance of contract.

Acts done by the arbitrators towards the execution of their duty, such as surveying the lands, will not be considered acts of part performance of the agreement, so as to sustain the bill for specific performance (*g*).

(*c*) Blundell v. Brettargh, 17 Ves. 232.

(*d*) Cheslyn v. Dalby, 2 Y. & C. 170.

(*e*) Gourlay v. Duke of Somerset, 19 Ves. 429. See Rowe v. Wood, 1 J. & W. 315, 346.

(*f*) Gregory v. Mighell, 18 Ves. 328.

(*g*) Cooth v. Jackson, 6 Ves. 11; Blundell v. Brettargh, 17 Ves. 232.

When the reference becomes abortive in consequence of the fault of a party to the submission, equity has been known to interfere and enforce it against him. Thus, when on an agreement to sell lands at a valuation to be made before a certain day, the vendor refused to allow the referees to enter on the lands to value them, so that no price was fixed within the time limited; the Vice-Chancellor decreed, that the valuation should be made by them, as if no time had been limited, and that the contract should be carried into execution according to such valuation; for though time is as essential in equity as in law, yet in equity a defendant is not permitted to set up a legal defence, which has grown out of his own misconduct (*h*).

Contract enforced, party preventing award being made in time.

(*h*) Morse v. Merest, 6 Madd. 26.

THE END.

APPENDIX.

APPENDIX OF FORMS.

SUBMISSIONS.

I.

1. Memorandum of an agreement (*a*) made this [ ] day of [ ], A. D. [ ], between A. B., of [ ], and C. D., of [ ]. — Submission by agreement.

2. Whereas disputes and differences have arisen, and are still subsisting, between the above-mentioned parties, it is hereby agreed by and between them, to refer all disputes and matters in difference whatsoever between them (*b*), — Recital of differences, subject referred.

3. To the award, order, and final determination of X. Y. of [ ], Esq., barrister-at-law ; — Appointment of arbitrator.

4. So as the above-mentioned arbitrator make and publish his award in writing, and signed by him, of and concerning the matters referred, ready to be delivered to the parties or to either of them (*c*); — Formal requisites of award.

5. Or if they or either of them shall be dead before the making of the award, to their respective personal representatives who shall require the same (*d*); — Death of party no revocation.

6. On or before the [ ] day of [ ] next (*e*), or on or before any other day, to which the arbitrator shall by any writing signed by him, endorsed on this submission, from time to time enlarge the time for making his award (*f*). — Duration, power to enlarge time.

(*a*) See P. 1, ch. 3, s. 2, d. 2, p. 54, as to submissions by agreement.
(*b*) See P. 2, ch. 2, p. 117, as to the subject matters referred.
(*c*) See P. 2, ch. 5, s. 1, p. 236, as to the formal requisites of the award.
(*d*) See P. 2, ch. 3, s. 3, d. 8, p. 165, as to this provision against the death of a party.
(*e*) See P. 2, ch. 3, s. 1, p. 130, as to the duration of the arbitrator's authority.
(*f*) See P. 2, ch. 3, s. 2, p. 136, as to enlarging the time.

Power over costs.

7. And it is further agreed, that the costs of preparing and executing these presents and a duplicate hereof, and the costs of the reference and award, shall be in the discretion of the arbitrator, who may direct to, and by whom, and in what manner, the same or any part thereof shall be paid (*g*).

Agreement to be made rule of court.

8. And it is further agreed, that this submission may be made a rule of "the Court of Queen's Bench," [*or* "the Court of Common Pleas," *or* "the Court of Exchequer," *or* "the High Court of Chancery,"] at the instance of either the said A. B. or C. D., his executors or administrators (*h*), without any notice to the other of them (*i*).

Power to order what shall be done.

9. And it is further agreed, that the arbitrator shall be at liberty to order and determine, what he shall think fit to be done by either of the parties respecting the matters referred (*k*);

Power to examine parties.

10. And that it shall be in the discretion of the arbitrator to examine the parties, either or both of them (*l*);

Witnesses to be sworn.

11. And that the witnesses on the reference and the parties (if examined) shall be examined on oath (*m*);

Power to proceed ex parte.

12. And that the arbitrator shall be at liberty to proceed ex parte, in case either party, after reasonable notice, shall at any time neglect or refuse to attend on the reference, without having previously shown to the said arbitrator, what the latter shall consider good and sufficient cause for omitting to attend (*n*);

Power to call for documents.

13. And that the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings, and documents within their possession or control, which the arbitrator may require and call for, as in his judgment relating to the matters referred (*o*);

Parties to forward, not prevent award,

14. And that the parties respectively shall do all other acts necessary to enable the arbitrator to make a just award; and that neither of them shall wilfully and wrongly do or cause to be done any act to delay or prevent the arbitrator from making his award (*p*).

(*g*) See P. 2, ch. 7, s. 1, p. 370, as to costs.

(*h*) See P. 1. ch. 3, s. 3, p. 57, as to the consent clause.

(*i*) See P. 3, ch. 5, s. 2, p. 551, as to making the submission a rule of Chancery.

(*k*) See P. 2, ch. 8, s. 2, p. 418, as to the arbitrator's power in saying what shall be done.

(*l*) See P. 2, ch. 4, s. 1, d. 7, p. 182, as to examining the parties.

(*m*) See P. 2, ch. 4, s. 1, d. 5, p. 176, as to examination on oath.

(*n*) See P. 2, ch. 4, s. 1, d. 11, p. 191, as to proceeding ex parte.

(*o*) See P. 2, ch. 4, s. 1, d. 8, p. 184, as to production of documents.

(*p*) See P. 1. ch. 3, s. 8, p. 100, as to preventing award being made.

15. And it is further agreed, that the said parties, their executors and administrators, shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, so to be made and published as aforesaid (*q*); Parties to abide by award.

16. And that none of them shall bring or prosecute any writ of error, or any action, or suit at law or in equity, against the arbitrator or against any other of them, concerning the matters referred (*r*). Parties not to bring action or suit.

17. And it is further agreed, that in the event of either of the parties, their executors or administrators, being dissatisfied with the award, or disputing its validity, and moving the court to set the same or any part thereof aside, the said court, whether the award be insufficient in law or not, shall have power, if it shall think fit, to remit the award, or the matters hereby referred, or any of them, from time to time, to the reconsideration and determination of the said arbitrator (*s*). Power to refer back award.

18. In witness whereof the said parties have hereunto set their hands, the day and year first above written (*t*). Conclusion.

Witness, A. B.
O. P. C. D.

19. [*This clause may be used instead of clause* 2, *in the above Form I.*]—Whereas certain differences and disputes have arisen and are still pending between the said parties [*for instance,* "as to whether the said A. B. is indebted to the said C. D. in any and what sum of money, and as to the price the said C. D. ought to pay for the stock in trade taken by him off the hands of the said A. B.,"] it is agreed by and between them that the same shall be referred, &c. Recital special differences; matters referred.

20. [*Instead of clause* 2, *Form I.*]—Whereas an action is now depending in her Majesty's Court of Queen's Bench, wherein the said A. B. is the plaintiff and the said C. D. the defendant, it is agreed [*if it be in-* Recital action pending; matters referred.

(*q*) See P. 3, ch. 3, p. 484, as to action for non-performance of award.

(*r*) See P. 1, ch. 3, s. 5, p. 70, as to agreement not to sue.

(*s*) See P. 3, ch. 9. s. 8, p. 658, as to power of court to refer back; P. 2, ch. 4, s. 1, d. 16, p. 198, as to duty of arbitrator when award referred back.

(*t*) The following clauses and provisions to the end of Form No. I., together with those already inserted in the body of the preceding agreement of reference, comprise, it is believed, all those that are in general use, as well as some special clauses, which it is trusted may be of service.

They have been all set forth together, to give parties a large choice, out of which to select those, that may suit their particular case.

For the sake of convenience they are collected in the first form of submission, which happens to be that of a submission by agreement; but they may equally be inserted, either verbatim, or with little alteration, in a submission by bond, by deed, by judge's order, by order of Nisi Prius, or rule of court.

tended not to refer the action, but only the subject of action, add, " that all proceedings in the action shall be stayed, but that in order to ascertain, settle, and adjust all accounts, claims, and demands in dispute in the said action"], that the same [*if the reference is to be general, add,* " and all matters in difference between the parties"] shall be referred, &c.

Recital bill in Chancery dismissed; matters referred.

21. [*Instead of clause* 2, *Form I.*]—Whereas the said A. B., on or about the [ ] day of [ ], A. D. [ ] filed a bill in the High Court of Chancery against the said C. D. praying [*here state the prayer of the bill*]; and whereas the said parties have agreed, that the said suit in the Court of Chancery shall be dismissed without costs, and that the several matters, questions, and differences hereunder specified, viz. whether [*here enumerate the points to be decided*] shall be referred, &c.

Recital partnership; matters referred.

22. [*Instead of clause* 2, *Form I.*]—Whereas A. B., C. D., E. F., G. H., and I. K., have carried on the business of [ ], in partnership, and the accounts between them have become involved, and differences have arisen among them relating thereto, it is hereby agreed that the co-partnership accounts and all matters in difference between the parties, or any of them, or between any one or more of them, and any other one or more of them, shall be referred, &c.

Appointment of two arbitrators and umpire.

23. [*Instead of clause* 3, *Form I.*]—to the award, order, final end and determination of U. V. and X. Y., arbitrators nominated by the said A. B. and the said C. D. respectively, and " in case they shall not agree, to the umpirage of S. T.," [*or* " in case they shall not agree, to the award of such person, as the said arbitrators shall appoint as umpire"], [*or* " in case they disagree about making an award, or fail to make an award before the [ ] day of [ ], then to the award, umpirage, final end, and determination of such umpire, as the said arbitrators shall by writing under their hands, endorsed on these presents, before they enter upon the consideration of the matters referred, nominate and appoint"] (*x*).

Appointment of umpire from time to time.

Before entering on reference.

24. [*Instead of clause* 3, *Form I.*]—to the award, order, final end and determination of U. V. of [ ], and X. Y. of [ ], and in case the said arbitrators shall not agree in the determining any matter or thing, or matters or things, hereby referred to them; the matter or thing, or matters or things, on which they shall not agree, shall from time to time be referred to and determined by such person as they, the said arbitrators, shall appoint in writing [before they enter upon the consideration of the matters referred].

[*This provision may be inserted instead of the words between the brackets,*

(*x*) See P. 2, ch. 4, s. 4, p. 214, as to the umpire.

"and such appointment of an umpire shall from time to time be made, as soon as conveniently may be after such difference of opinion shall from time to time arise"] (*y*). After difference arisen.

25. [*Instead of clause* 3, *Form I.*]—to the award, order, arbitrament, final end and determination of U. V. of [ ], and X. Y. of [ ], and of such third arbitrator as the said U. V. and X. Y. shall, by writing under their hands, to be indorsed on these presents, before they proceed in this arbitration, nominate and appoint to act with them, [*when it is intended that any two out of the three shall be empowered to act, add the words,* " or of any two of them"] (*z*). Appointment of two arbitrators, who are to appoint a third,

26. [*Instead of clause* 4, *Form I.*]—so as "the said arbitrators" [*or* "the said arbitrators or any two of them," *or* " the said arbitrators or umpire"] make and publish ["his or"] their award [" or umpirage"] in writing, under ["his or"] their hands, [*or* " under their hands and seals,"] of and concerning the matters referred, ready to be delivered to the parties or any of them (*a*). Formal requisites of award.

27. [*Instead of clause* 6, *Form I.*]—[*When the arbitrator is to have no power to enlarge the time, omit all in clause* 6 *that follows the word* " *next* "] (*b*). [*When the arbitrator is to have a limited power of enlargement, say*] on or before the [ ] day of [ ], or on or before any other day not later than the [ ] day of [ ] to which " the said arbitrator" [*where there are arbitrators and an umpire with the same limit of time, say,* " the said arbitrators or umpire"] shall (*it is better to add,* " by any writing," *or* " by any writing signed by him" [*or* "him or them"], *or* "by any writing under his hand" [*or* " his or their hands"] " at the foot of these presents"), enlarge the time for making his [*or* " his or their"] award [*or* " award and umpirage"] (*c*). Duration, powers to enlarge.

28. [*Instead of clause* 6, *Form* I.]—[*When there are two arbitrators and an umpire, but the latter is to have a later day for making his award, adapt either of the preceding forms to the case of two arbitrators, and add*] and "in case the said arbitrators do not make and publish their award on or before the said [ ] day of [ ] [*when no time is limited for the arbitrators, say, instead of the preceding clause,* " in case the said arbitrators finally disagree about making an award"] then so as the said umpire make and publish his award or umpirage, &c., [*continue adapting the* Umpire with further time than arbitrator.

(*y*) See P. 2, ch. 4, s. 4, p. 214, as to the umpire.

(*z*) See P. 2, ch. 4, s. 3, p. 206, as to joint arbitrators.

(*a*) See P. 2, ch. 5, s. 1 p. 236, as to the formal requisites of the award.

(*b*) See P. 2, ch. 3, s. 1, p. 130, as to the duration of the arbitrator's power.

(*c*) See P. 2, ch. 3, s. 2, p. 136, as to enlarging the time.

clauses 4, 26, and 27, to the case of the umpire, giving him a later period, or a general power of enlargement] (*d*).

Death of party not to affect reference.

29. [*This may be added explanatory of clause 5, Form I.*]—that the submission hereby made shall not be defeated or affected by the death of the said parties, or of any of them, pending the same, but shall or may be proceeded in, and the matters in difference determined, in the same manner, as if the award of the said arbitrators had been made or determined in the lifetime of the party or parties so dying; and the executor or administrator, executors or administrators of the party or parties so dying shall be, and be deemed and considered to be a party or parties to the reference or submission hereby made, any rule of law or equity to the contrary notwithstanding (*e*).

Costs of reference to abide event.

30. [*Instead of clause 7, Form I.*]—that the costs of the reference and award shall abide the event of the award (*f*).

Costs of cause abide event, Costs of reference in arbitrator's discretion.

31. [*Instead of clause 7, Form I.*]—[*when a cause or suit is referred, with or without other matters, a common provision is*] that the costs "of the cause" [*or* "of the cause and of the special jury," *or* "of the suit"] shall abide the event of the award (*g*) as to the "cause" [*or* "suit"], and that the costs of the reference and award shall be in the discretion of the arbitrator, who may direct to, and by whom, and in what manner, the same or any part thereof shall be paid (*h*). [*The following addition is very useful with respect to the costs of an action when they abide the event*]

Power to certify for costs.

—and that the arbitrator shall have all the powers of certifying, which a judge of Nisi Prius would have had on the trial of the said cause (*i*).

Costs as between attorney and client.

32. That the arbitrator shall be empowered to award costs to be paid as between attorney and client (*k*).

Evidence taken by one arbitrator may be acted on by both, or by umpire.

33. That the said X. Y. shall be at liberty forthwith, and alone, to take evidence, as he may think fit, relating to the said causes, suits, and matters in difference; and that the said arbitrators and the umpire shall respectively be at liberty to proceed upon the evidence, which shall be taken before the said arbitrators, or before the said X. Y. alone.

Umpire not to rehear

34. That the said umpire shall be at liberty to act upon the evidence

(*d*) See P. 2, ch. 4, s. 4, d. 4, p. 223, as to the commencement of the umpire's authority.

(*e*) See P. 2, ch, 3, s, 3, p. 162, as to death revoking authority.

(*f*) See P. 2, ch. 7, s. 2, p. 379, as to duty of arbitrator when costs abide the event.

(*g*) See P. 2, ch. 7, s. 2, d. 2, p. 371, as to costs abiding the event.

(*h*) See P. 2. ch. 7, s. 2, d. 2, p. 372, as to costs in discretion of arbitrator.

(*i*) See P. 2, ch. 7, s. 3, p. 388, as to certifying for costs.

(*k*) See P. 2, ch. 7, s. 1, d. 3, p. 373, as to what costs arbitrator may award.

taken before the said arbitrators, and (unless requested to hear evidence) to make his award without hearing any witnesses, or receiving any fresh evidence: provided nevertheless that if either party request him to rehear the witnesses, or any of them, or tender any fresh evidence relative to the matters in difference, the said umpire shall rehear such witnesses and receive such evidence. Case unless requested.

35. That it shall be lawful for the arbitrators or the umpire to obtain information upon or in respect of the premises hereby referred, or any of them, either by the statements of the parties hereto, or of any of them, made either in private, or in the presence of the other party or parties, or by parol or written evidence, or by such other ways or means, as they or he shall in their or his judgment think most advisable, and deem most applicable to the nature and circumstances of the case (*l*). Dispensing with regular evidence.

36. [*Instead of clause* 12, *Form I.*]—that the said arbitrator shall be at liberty to proceed ex parte in case of the non-attendance of either of the said parties, or of their witnesses, after [ ] clear days previous notice in writing, under the hand of the said arbitrator, given to the said parties respectively, or left at his or their respective offices, or of their attornies or agents in London, notifying the time and place of meeting to proceed with the said reference (*m*). Power to arbitrator to proceed ex parte.

37. That the said arbitrator "at the request of either party shall" [*or if it be not intended to be compulsory*, "shall be at liberty to"] raise by a sufficient statement of facts any point of law on the face of his award for the opinion of the court (*n*). Power to arbitrator to state a case.

38. That the arbitrator shall enter upon the reference and make a preliminary award, stating the facts necessary to raise the question, whether [*for instance*, "whether at law the defendants are concluded by the certificates given by Mr. O. P., the resident engineer of the defendants, and produced in court on the trial of this cause,] and that the opinion of the court be taken on that point, before the said arbitrator proceeds with the rest of the reference. Power to make preliminary award raising a point of law.

39. That the said arbitrator shall be at liberty to direct a verdict to be entered in the said cause for the plaintiff or the defendant, as he shall think proper (*o*). Power to direct entry of verdict.

(*l*) See P. 2, ch. 4, s. 1, dd. 9, 10, pp. 185, 189, as to the ordinary mode of conducting the case. P. 2, ch. 4, s. 2, p. 201, as to taking legal or scientific opinion.

(*m*) See P. 2, ch. 4, s. 1, d. 11, p. 191, as to proceeding ex parte.

(*n*) See P. 2, ch. 5, s. 8, dd. 4, 5, pp. 306, 310, as to stating a case in the award.

(*o*) See P. 2, ch. 6, s. 3, p. 350, as to awarding entry of a verdict.

Power to award entry of judgment. Judgment by default, &c.

40. That the said arbitrator shall be at liberty "to direct judgment to be entered for the plaintiff or the defendant in the said cause" [*or, a more restricted power,* "to direct judgment by default to be entered against the defendants in the said action."] ["*Or, a more general power,* to order such judgments and proceedings to be had and taken in or about the said cause, suits, and matters in difference, as to the said arbitrator shall seem fit"] (*p*).

Power to award discontinuance and dismissal of bill.

41. That the said arbitrator shall be at liberty to direct the said action to be discontinued (*q*), and the said suits to be dismissed with or without costs (*r*).

Relieving arbitrator from finding on the issues.

42. [*When the costs of the cause abide the event, this clause may often usefully be added*]—that the said arbitrator shall, unless requested to find on any specific issues joined in the said cause, be at liberty to find generally for the plaintiff or for the defendant; and that the costs of any specific issues, if found, shall abide the event of the award on each (*s*).

Power to employ an accountant.

43. That the arbitrator, if he shall think it necessary, shall be at liberty, and is hereby authorized to appoint an accountant to assist him, at the expense of the said parties, who shall be liable to such accountant for his reasonable remuneration; and that as between the said parties the expense of such accountant "shall be borne and paid in equal moieties by the said parties," [*or* "shall be in the discretion of the arbitrator;"] such accountant to be required to make his solemn declaration, according to the statute, of the truth of the account or statement to be made out by him (*t*).

Power to order removal of obstructions.

44. That the said arbitrator shall have power to direct what shall be done respecting the removal of any of the obstructions charged in the declaration in the said cause, and to direct the prostration of the whole or any part of the embankment in the indictment mentioned, as he shall think fit (*u*).

Power to cause plans and maps of lands to be made.

45. [*In submissions respecting lands, the following clause may be useful.*]—That it shall be lawful for the said arbitrators, or their umpire, to admeasure, or cause the said lands to be admeasured, and to make, or cause to be made, a plan or map, or plans or maps, of the said messuage,

(*p*) See P. 2, ch. 6, s. 5, p. 362, as to awarding entry of judgment.

(*q*) See P. 2, ch. 6, s. 1, p. 337, as to disposing of a cause without deciding it.

(*r*) See P. 2, ch. 6, s. 6, p. 367, as to awarding on a suit in equity.

(*s*) See P. 2, ch. 6, s. 2, p. 339, as to awarding on a cause and the issues joined in it.

(*t*) See P. 2, ch. 4, s. 2, p. 201, as to the arbitrator delegating his power.

(*u*) See P. 2, ch. 8, s. 2, p. 415, as to arbitrator's duty in executing the power. See also award of prostration of the embankment, Form 70.

farm lands, and hereditaments, and to do and execute all such further and other acts, matters, and things, with respect to the same, as they or he shall think necessary and proper for the purposes of this reference.

Costs of such maps and plans.

46. [*This may follow the preceding clause.*]—and that the costs, charges, and expenses of preparing and executing these presents, and of making such admeasurements, plans, and maps as aforesaid, [*insert when necessary,* " and of making such valuation, appraisement, and division as aforesaid,"] and of all such other necessary acts, matters, or things, which shall be done and executed as aforesaid, " shall be borne and paid by and between the said A. B. and C. D. in equal shares and proportions," [*or* " shall be in the discretion of the said arbitrators or umpire."]

Principle on which to calculate value of the land.

47. That for the purpose of making the valuation of the portion of Whiteacre Farm, mentioned in the schedule, the arbitrator shall previously fix and determine, and specify in his award, the best and most improved yearly rent, for which the lands mentioned in the schedule might reasonably be expected to have been let at the date of this agreement, and shall calculate the value of the said lands at [ ] years purchase of such improved rent.

Party preventing arbitrator to pay costs.

48. That if either party shall by affected delay, or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as " the above-mentioned court " [*or* " the arbitrator"] shall think reasonable (*x*).

Making admissions.

49. And because the parties hereto on both sides are willing to make the admissions hereinafter mentioned, so as to save the expense of proving the several matters so admitted, therefore " it is agreed " [*or if the submission be by judge's order, say instead,* " by the like consent I do further order;" *if by order of Nisi Prius say,* " it is further ordered "] that the following admissions be made, that is to say, [*here specify the admissions.*]

Power to court to refer back.

To same or different arbitrator.

50. [*Instead of clause* 17, *Form I.*]—that in the event of any application to the said court on the subject of this order, the reference, or the award, the court may, if it think fit, refer back to the said arbitrator [*sometimes it may be as well to insert,* " or to any other person whom the court shall appoint,"] the whole or any part of the matter of this order, upon such terms as the said court shall think proper (*y*).

Provisions for appoint-

51. [*Where U. V. has been nominated as arbitrator by A. B., and X. Y.*

(*x*) See P. 1, ch. 3, s. 8, d. 2, p. 101, as to moving for costs under this clause.

(*y*) See P. 3, ch. 9, s. 8, p. 658, as to power of court to refer back. P. 2, ch. 4, s. 1, d. 16, p. 198, as to power and duty of arbitrator on reference back.

ing new arbitrators.

by C. D., it may be convenient to add this clause,]—that in case the said U. V. shall die, or refuse, or become incapable to act as arbitrator, before the whole of the premises hereby referred shall be determined by the said arbitrators or their umpire, then the said A. B., his heirs, executors, or administrators, shall forthwith thereafter nominate and appoint some other fit and indifferent person to be arbitrator in the stead and place of the said U. V.; and so in like manner upon the decease, or neglect, or refusal to act, of any arbitrator succeeding to the place of the said U. V. (*z*). [*A similar clause should be inserted as to the arbitrator appointed by C. D. Then let it conclude*] that every arbitrator so to be appointed as a substitute for the said U. V. or X. Y., or any succeeding arbitrator, shall have the same powers and authorities as the arbitrator, for whom the substitution is made, would have had, had he continued to act.

Liquidated damages for refusing to appoint new arbitrator.

52. [*This may follow the preceding clause,*]—that if the said A. B. or C. D., or their heirs, executors, or administrators, or any of them respectively, when bound to appoint a new arbitrator, pursuant to the above provisions, in lieu of any arbitrator who may die, refuse to act, or become incapable, shall neglect, or refuse so to do for one-and-twenty days, after a notice in writing on the part of the party or parties entitled to require such appointment shall have been served on the party or parties bound to make such appointment, then the latter party or parties shall pay to the former party or parties the sum of £ [ ] by way of liquidated damages for such neglect or refusal (*a*).

Penalty for breach of submission.

53. And for the due execution and observance of the agreement hereinbefore contained on the part of the said A. B. [*and also for any other party for whom A. B. is liable*], the said A. B. doth hereby bind himself, his heirs, executors, and administrators in the sum of £ [ ], [*add a similar agreement by C. D.*].

Parties to pay arbitrator's charges.

54. And the said parties [*or* "the said attorneys of the said parties"] jointly and severally agree to and with the said arbitrator, in consideration of his taking upon himself the burthen of the reference, to pay to the said arbitrator his reasonable charges for the arbitration and award.

(*z*) See P. 2, ch. 3, s. 3, d. 7, p. 160, as to death of arbitrator.

(*a*) See P. 1, ch. 3, s. 4, d. 2, p. 66, as to liquidated damages.

II.

We agree to refer all matters in difference between us to the award of X. Y. Agreement of reference concise form.

A. B.
C. D.

III.

Memorandum of agreement made this [ ] day of [ ], A. D. [ ], between A. B. of [ ], and C. D. of [ ]. Agreement of reference by executor as to testator's estate.

Whereas the said A. B. is executor of the last will and testament of E. F., late of [ ], deceased, and whereas certain differences have arisen between the said A. B. as such executor and the said C. D., in regard to claims by the said A. B., as such executor, against the said C. D., and by the said C. D. against the said A. B., in respect of the said testator's estate; it is hereby agreed by and between the said parties, to refer all matters in difference respecting the said testator's estate to the final award of X. Y. of [ ], for him to determine whether the said A. B., as such executor, has any and what claim against the said C. D., and whether the said C. D. has any and what claim against the said testator's estate, so as, &c., [*continue as in Form I., clauses* 4, 5, 6.] Reference not to be an admission of assets. And it is further agreed, that this submission to arbitration shall not be deemed or taken to be an admission by the said A. B. that he has assets of the said testator,* but that the said A. B. shall be at liberty to deny before the said arbitrator "that at the date of this submission he had any assets in his hands lawfully liable to the demands of the said C. D." [*or* "at any time before the case is closed, that he has at the time of such denial assets in his hands lawfully liable to the demands of the said C. D."]; and if the said A. B. shall make such denial as aforesaid, that the said arbitrator, if requested by the said C. D., shall inquire "whether at the date of this submission the said A. B. had," [*or* "whether at the time of such inquiry the said A. B. has,"] assets of the said testator lawfully liable to pay the whole or any part of the sums claimed by the said C. D. Arbitrator to inquire as to assets. And if the said arbitrator shall on the balance find any money to be due to the said C. D., he shall, if he shall find that the said A. B. had, at the time to which the said inquiry referred, assets liable to the demands of the said C. D., direct the said A. B. to pay to the said C. D. the balance, or so much thereof as the assets so found to be liable shall be sufficient to satisfy. Finding assets to direct executor to pay sum due. And if the said arbitrator shall find that the said A. B. had no such assets, or not enough of such assets to pay the whole amount so found due to the said C. D., he shall be at liberty to award Finding no assets to direct execu-

tor to pay out of assets quando.

that the said A. B. shall pay to the said C. D. the said amount, (or as much thereof as the assets in hand do not avail to satisfy as aforesaid,) out of any assets which may have come into the hands of the said A. B. since the time to which the said inquiry respecting the assets refers, or which may hereafter come into them. And that if the said arbitrator shall find any money due from the said C. D., he shall direct the latter to pay the same to the said A. B. [*Add the clause for making the submission a rule of court, Form I., clause* 8, *and such other clauses as may be suitable*] (*b*).

Arbitrator to direct payment to executor of money due.

IV.

Agreement of reference by executor as to liability, not as to assets.

[*Commence as in the previous Form as far as the asterisk.*]– and that the said arbitrator shall not consider or inquire whether the said A. B. had or has any assets of the said testator, nor shall his award conclude, or be construed to conclude, any questions as to assets, but shall leave the same entirely open. And it is further agreed, that if the said arbitrator shall find any balance of money due to the said A. B. as such executor, he shall direct the said C. D. to pay the same to the said A. B.; but if he shall find a balance in favor of the said C. D., he shall add a direction that the said A. B. shall pay the same to the said C. D. out of the assets (if any) which may be in his hands, or which may hereafter come to them; and that it shall not be lawful for the said arbitrator to direct the said A. B. to pay in any other manner. [*Conclude with the clause for making the submission a rule of court, Form I., clause* 8, *and other needful clauses*].

To direct executor to pay out of assets, if any.

V.

Agreement to refer questions relating to contract for sale of land.

Articles of agreement made and concluded the [ ] day of [ ], A. D. [ ], between A. B. of [ ], of the one part, and C. D. of [ ], of the other part. Whereas the said A. B. did, in or about the year A. D. [ ] by writing under his hand contract with the said C. D. for the absolute sale to the latter of divers farms, lands, tenements, and other hereditaments, situate, or being in or near [ ] in the county of [ ], and the inheritance thereof in fee simple, at and for the price and sum of £ [ ], which sale so made to the said C. D. has not yet been completed. And whereas a certain farm and premises, called White Acre Farm, now let on lease under the yearly rent

Recital of contract.

(*b*) See P. 1, ch. 2, s. 2, d. 4, p. 36, as to executors parties to reference.

of £ [ ], is included in the contract for sale so agreed to be made to the said C. D.; and whereas the said C. D., at the special instance and request of the said A. B., hath consented and agreed that such part of the said farm, called White Acre Farm, and containing [ ] acres, [ ] roods, and [ ] perches, as is specified in the schedule hereunder written, shall be discharged from the above-recited contract, in consideration that the said C. D. shall be allowed and entitled to deduct out of the said purchase-money a compensation (the amount thereof to be ascertained by arbitration) for the loss of the said [ ] acres, [ ] roods, and [ ] perches, the purchase of which shall be so relinquished by the said C. D. as aforesaid; and that the said C. D. shall have, and be entitled to, a yearly rent or sum, (the amount thereof to be determined by arbitration,) to be paid and payable in respect of the remaining part of the said farm and lands, called White Acre Farm, which is retained by, and intended to be conveyed to, the said C. D., as and for the apportioned part of the aforesaid yearly rent. And whereas a dispute has arisen between the said parties, whether a certain farm and lands, called Black Acre Farm, are or ought to be included in, and bound by, the said contract for sale, though they be not mentioned in express words therein. And whereas certain other lands and premises, called Green Acre Farm, are admitted by the said A. B. to form part of the estate so contracted to be sold to the said C. D. in fee simple, and were, when the said contract was entered into, considered by both parties to be of freehold tenure in fee simple, and the amount of the consideration money for the purchase of the same was calculated on the supposition that the whole of the said estate and hereditaments were to be conveyed to the said C. D. in fee simple; and whereas the said farm and lands, called Green Acre Farm, have since been discovered to be held by the said A. B. on leasehold tenure only; and it has been agreed between the said parties that the said C. D. shall be entitled to retain by way of compensation out of his said purchase-money the difference in value, to be settled by arbitration, between the leasehold tenure by which the said premises is held, and the inheritance in fee simple of the same. Now these presents witness, that in consideration of all and singular the premises, it is agreed and declared by and between the said parties hereto, that it be referred to X. Y. of [ ], to determine the amount of the compensation to be allowed to the said C. D. in respect of the portion of White Acre Farm so agreed to be discharged from the said contract of sale as above-mentioned: and also to ascertain the amount of the apportioned rent to be paid to the said C. D. in respect of the said portion of White Acre Farm retained by and intended to be conveyed to him: and also to decide whether the said lands and farm, called Black Acre Farm, or any part thereof, (and if any, what part,) are included in and bound by the said contract of sale: and also to ascertain the amount of the dif-

Portion of land to be excepted out of contract.

Price of portion to be settled by arbitration.

Amount of apportioned rent to be settled by arbitration.

Whether certain premises included in contract.

Recital, farm supposed freehold found to be leasehold.

Difference in value between leasehold and freehold tenure to be settled by arbitration.

Arbitrator to determine value of portion deducted.

To fix amount of apportioned rent.

To decide whether

land included in contract. ference in value between the leasehold tenure on which the said Green Acre Farm is held, and the inheritance in fee simple of the same.

To ascertain difference between freehold and leasehold value of farm. [*Besides the usual clauses, including of course the clause for making the submission a rule of court, clause* 8, *Form I., the special clauses for measuring and valuing the land, clauses* 43, 44, 45, *Form I., may be found serviceable.*]

VI.

Arbitration clause in deed of partnership. And the said A. B. and the said C. D. do each of them, for himself, his executors, and administrators, covenant, promise, and agree to and with the other of them, his executors and administrators, that if at any time or times during the copartnership, or at or after any determination thereof, any variance, dispute, doubt, or question shall arise, happen, or be moved between the said parties or either of them, their executors, or administrators, in, for, about, or touching the consideration of these presents, or the joint concern or copartnership, or any covenant, agreement, clause, matter, or thing herein contained, or in the construction hereof, or in anywise relating hereto; then every such variance, dispute, doubt, or question, shall be referred to, and be resolved and determined by, two fit and indifferent persons, to be elected and chosen one by each of the said partners, within twenty days next after such variance, dispute, doubt, or question shall arise, happen, or be moved; with power to the arbitrators to elect an umpire in case of dispute: and that each of the said partners, his executors, and administrators shall abide by, perform, and keep the award and determination of the arbitrators, or of their umpire, without any further dispute or trouble whatsoever.

Provision for liquidated damages for refusing to appoint an arbitrator. And that, if either the said A. B. or C. D., his executors or administrators, shall neglect or refuse to appoint an arbitrator pursuant to the above provisions for twenty-one days, after the other of them shall have appointed such arbitrator on his part, and shall have served a written notice requiring the party so neglecting or refusing to make such appointment;* the party so neglecting or refusing shall pay to such other the sum of £ [ ], by way of liquidated damages for such neglect or refusal (*n*).

On refusal, single arbitrator may act alone. [*Or this clause may be inserted after the asterisk, instead of the provision for liquidated damages,*] then the arbitrator appointed by the party serving such notice shall at the request of such party proceed to hear and determine such matters in difference, as if he were an arbitrator appointed by both parties for that purpose; and that if after the said arbitrator shall have been so requested as aforesaid, either party shall revoke, or attempt to revoke the authority of the said arbitrator, such party shall

Liquidated damages for revocation.

(*n*) See P. 1, ch. 3, s. 4, d. 2, p. 67, as to liquidated damages.

pay to the other of them £ [ ], as liquidated damages; and the said arbitrator, if requested, shall proceed to hear and determine the said matters, notwithstanding such revocation, or attempted revocation (*e*). Arbitrator to proceed notwithstanding revocation.

VII.

(*f*) Know all men, by these presents, that I, C. D., of [ ], am held and firmly bound to A. B., of [ ], in £ [ ], of good and lawful money of Great Britain, to be paid to the said A. B., or his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the [ ] day of [ ], in the year of our Lord [ ]. Submission by bond.

Whereas, [*here state the existence of differences between A. B. and C. D., or enumerate the special matters in dispute, as in a submission by agreement* (*See Form I.*,) *and proceed,*] and it is agreed by and between the said A. B. and C. D. to refer "the same" [*if the special matters have been recited, and the reference is to be general, say,* "the same and all matters in difference between them,"] to U. V., of [ ], and X. Y. of [ ], with liberty to them to choose and appoint an umpire. Now the condition of this obligation is such, that if the above bounden C. D., his heirs, executors, and administrators, do and shall on his and their part and behalf in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of the said arbitrators respecting the matters referred; so as the said arbitrators make and publish their award in writing of and concerning the same, ready to be delivered to the parties, or if they or either of them shall be dead before the making of the award, to their respective personal representatives who shall require the same; on or before the [ ] day of [ ], or on or before any other day not later than the [ ] day of [ ], to which the said arbitrators shall by any writing signed by them, indorsed on these presents, enlarge the time for making their said award: and in case the said arbitrators shall not make an award of and concerning the premises within the time limited as aforesaid; then if the said C. D., his heirs, executors, and administrators, do and shall upon his and their part and behalf, in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination of the person so by the said arbitrators to be chosen and appointed as umpire as aforesaid; so as the said umpire do make and publish his award or umpirage in writing [*continue as in*

Recital in condition.

Subjects referred to two arbitrators and umpire.

Condition to abide award.

Arbitrator not making award, to abide award of umpire.

(*e*) See P. 2, ch. 3, s. 3, d. 3, p. 156, as to effect of award after revocation in equity.

(*f*) See P. 1, ch. 3, s. 2, d. 3, p. 54, as to submissions by bond.

Form I. clauses 4, 5, *and* 6, *adapting them to the case of an umpire,*] then this obligation to be void, otherwise to remain in full force. And the said A. B. and C. D. do hereby consent and agree that this submission shall be made a rule of the Court of Queen's Bench at the instance of either of the said parties, their executors, or administrators. And it is further agreed by and between the said A. B. and C. D. that [*here add such of the clauses and provisions given in Form I. as are applicable.*]

Submission to be made rule of court.

Signed, sealed, and delivered, in the presence of O. P. C. D. (L. S.)

[*A. B. should execute to C. D. a similar bond with a similar condition.*]

VIII.

[*The bond the same as in the above precedent.*]—The condition of this obligation is such, that if the above bounden C. D., his heirs, executors, and administrators, on his or their part or behalf, shall and do in all things well and truly stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of X. Y., of [ ], appointed and named as well by and on the part and behalf of the above-bounden C. D., as of the above-named A. B., to arbitrate, award, order, judge, and determine, "of and concerning all matters in difference between them;" [*or more commonly,* "of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties;"] so as the above-mentioned arbitrator [*continue as in Form No. I, clauses* 4, 5, *and* 6,] then this obligation to be void, or else to remain in full force. [*Add the clause to make the submission a rule of court, and such other clauses as are requisite.*]

Condition of bond of submission without a recital.

Reference to one arbitrator.

Subject matters referred.

Signed, sealed, and delivered, in the presence of O. P. C. D. (L. S.)

IX.

[*Money bond by D., E., and F. jointly and severally to A., B., and C.*]—Whereas the above-bounden D., E., and F., and the above-named A., B., and C., lately carried on the trade and business of [ ] in partnership; and whereas divers differences and disputes have arisen between the said A., B., C., D., E., and F. with respect to such trade and business, and

Submission by bond of all matters in difference between six partners.

the accounts relating thereto; and whereas it has been agreed to refer all such differences and disputes between the said parties, or any of them, to the award of X. Y., of [ ] an arbitrator appointed by and on the several parts and behalves, as well of the said D., E., and F., as of the said A., B., and C., to arbitrate respecting the same. Now the condition of the above-written obligation is such, that if the above-bounden D., E., and F., and each of them, their and each of their heirs, executors, and administrators, and every of them, shall, on his or their respective parts and behalves, in all things well and truly stand to, obey, perform, fulfil, and keep the award to be made by the said X. Y., of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of and concerning all actions, cause and causes of action, suits, claims, damages, and demands whatsoever, now or at any time heretofore had, made, moved, brought, commenced, or depending by or between the said parties, or any of them; so as the above-mentioned arbitrator [*continue as Form No I., clauses* 4, 5, *and* 6,] then this obligation to be void, otherwise to remain in full force (*g*). [*Add the clause for making the submission a rule of court, Form I. clause* 8. *Add such other clauses as may be advisable, as, for instance, the clause authorizing the employment of an accountant. See Form I. clause* 43.] [*There must be a similar bond from A., B., and C. to D., E., and F., with a similar condition.*]

Condition.

Subject matters referred.

X.

This indenture, made between A. B., of [ ], and C. D., of [ ], of the first part; E. F., of [ ], of the second part; and G. H., of [ ], of the third part.

Submission by deed.

Whereas differences have arisen, and are depending between the said A. B. and C. D., and the said E. F., and also between the said A. B. and the said E. F., and also between the said E. F. and the said G. H., touching and concerning [*here shortly state the matters*]; and in order to put an end to the said differences, the said parties have agreed to refer "the same" [*or* "all matters in difference"] to the award of X. Y., of [ ].

Recital.

Agreement to refer.

Now this indenture witnesses, that they, the said A. B., C. D., E. F., and G. H., do and each of them doth, each for himself severally and respectively, and for his several and respective heirs, executors, and administrators, covenant and agree with each other, his heirs, executors, and administrators respectively, to stand to, abide by, observe, and perform the award and determination of the said X. Y. of and concerning the premises aforesaid; so as the above-mentioned arbitrator [continue as in *Form I. clause* 4, 5, *and* 6]. And the said parties do hereby further

Covenant to abide award.

(*g*) See P. 1, ch. 3, s. 2, d. 3, p. 55, as to submission by bond.

agree that [*add a clause for making the submission a rule of court, Form I. clause* 8, *and other clauses considered advisable.*] In witness whereof the said parties hereto set their hands and seals, the [ ] day of [ ], in the year of our Lord [ ].

Signed, sealed, and delivered, by the said [ ], in the presence of

A. B., (L. S.)
C. D., (L. S.)
E. F., (L. S.)
G. H., (L. S.)

XI.

Submission by judge's order.

A. B. v. C. D. } Upon hearing the attorneys or agents on both sides, and by their consent, I order that this cause ["and all other matters in difference between the parties"] be referred to the award, order, arbitrament, final end and determination of X. Y., of Harcourt Buildings, Temple, barrister-at-law; so as he shall make and publish his award in writing of and concerning the premises, ready to be delivered to the said parties, or to either of them; or if they or either of them shall be dead before the making of the said award, to their respective personal representatives who shall require the same; on or before the [ ] day of [ ] term now next ensuing, or on or before any other day, to which the said arbitrator shall by any writing under his hand, to be indorsed hereon, from time to time enlarge the time for making the said award. And by the like consent I further order, that the death of either of the said parties shall not act as a revocation of the authority of the said arbitrator: and that the costs of this action and of such reference (save and except the charges of the arbitrator and for the award) shall abide the event of the award, and that the costs and charges of the arbitrator and for the award shall be in the discretion of the arbitrator. And by the like consent I order that it be in the judgment of the said arbitrator to examine the said parties, who, together with their respective witnesses, shall be sworn or affirmed before the said arbitrator, and examined upon oath or affirmation; and that the said parties shall produce before the said arbitrator all books, deeds, papers, and writings, relating to the matters in difference between them, as the said arbitrator shall require. And I do likewise order, by and with the like consent, that the said parties shall on their respective parts in all things stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of the said arbitrator, so to be made and published as aforesaid: and that neither of the said parties shall bring or prosecute any writ of error, or any action or suit at law, or in equity, against the said arbitrator, or against each other respectively, concerning the matters referred by this order: and that if either party shall by

Award to be delivered to personal representatives.

Power to enlarge time.

Death no revocation.

Costs.

Power to examine the parties and witnesses on oath.

Power to call for books.

Parties to keep the award.

Parties not to sue.

affected delay, or otherwise, wilfully prevent the said arbitrator from proceeding in the reference, or from making his award, he shall pay such costs as to the Court of Queen's Bench shall appear just and reasonable. And by the like consent I do lastly order, that this order shall and may be made a rule of the said court, if the same court shall so please. [*These are the common provisions in such an order, but they may be varied as the parties please. It may be advisable to add the clause for referring matters back. See Form I. clauses* 17 *and* 50.] (*h*).

To pay costs for affected delay.

[Signature of the Judge.]

Dated this [ ] day of [ ], A. D. [ ].

XII.

A. B. v. C. D. and E. F. } Upon hearing the attorneys on both sides, and for G. H., and by their consent, I do order, that a verdict be entered for the plaintiff, damages £ [ ], subject to the award of the arbitrator hereinafter named, who shall be at liberty to order and direct for whom, and for what sum, the verdict shall be finally settled (*i*): and that it be referred to the award, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law, to settle all matters and differences between the said parties to this action, and between the said defendants and G. H.; and to order and determine what he shall think fit to be done by either party respecting the matters in dispute, who agree to be bound and concluded by such determination; so as the said arbitrator make and publish his award, &c. [*continue as in the prece ding form*] (*k*)

Submission by judge's order, stranger added.

Verdict entered subject to reference.

XIII.

Essex to wit. } At the assizes held at Chelmsford in and for the County of Essex, on Tuesday, the 3d day of March, in the year of our Lord one thousand eight hundred and forty-six, before the Right Honourable Thomas Lord Denman, Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen herself; the Honourable Sir Edward Hall Alderson, Knight, one of the Barons of our Lady the Queen, of her Court of Exchequer at Westminster, and others their fellows Justices of our Lady the Queen, appointed to take the assizes for the said County of Essex, according to the form of the statute in that case made and provided;

Submission by order of Nisi Prius on the usual terms.

(*h*) See P. 1, ch. 3, s. 6, d. 3, p. 77, as to submissions by judge's orders.

(*i*) See P. 2, ch. 6, s. 3, p. 350, as to entering a verdict.

(*k*) See P. 1, ch. 3, s. 6. d. 1, p. 76; and also P. 1, ch. 2, s. 1, d. 7, p. 29, as to adding strangers to the cause as parties to the reference.

Verdict taken subject to award.

B. v. D. } It is ordered by the court, with the consent of the parties, their counsel, and attornies, that a verdict be entered for the plaintiff, damages two thousand pounds, costs forty shillings, but that such verdict shall be subject to the award, order, [*when the arbitrator is at liberty to certify, add* " certificate,"] arbitrament, final end, and determination of X. Y., Esq., barrister-at-law; who is hereby empowered to direct, that a verdict shall be entered for the plaintiff or the defendant as he shall think proper; and to whom " this cause is" [*if the reference is to be general, say* " this cause and all matters in difference between the said parties are"] hereby referred; to order and determine what he shall think fit to be done by either of them respecting the matters in dispute; so as the said arbitrator shall make and publish his award [*add* " or certificate," *when there is a power to certify*] in writing concerning the matters referred, ready to be delivered to the said parties, or to either of them, or if they or either of them shall be dead before the making the said award, to their respective personal representatives, who shall require the same; on or before the fourth day of next Easter Term, or on or before any other day to which the said arbitrator shall, by any writing under his hand to be indorsed hereon, from time to time enlarge the time for making his said award [*add as above,* " or certificate"]. And it is also ordered that the costs of this cause to be taxed shall abide the event of the said award [" or certificate"], and that the costs of the reference and award [" or certificate"] shall be in the discretion of the said arbitrator, who may direct and award to and by whom and in what manner the same shall be paid: and that the said arbitrator shall have the same power to amend the record (*l*), and to certify, as a judge sitting at Nisi Prius would have upon a trial of the said cause. And it is also ordered by and with such consent as aforesaid, that it be in the judgment of the said arbitrator to examine the said parties, who, together with their respective witnesses, shall be examined upon oath: and that the said parties shall produce before the said arbitrator all books, deeds, papers, and writings relating to the matters in difference between them, as the said arbitrator shall require. And it is also ordered by and with such consent as aforesaid, that the said parties shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep, the award, order, [" certificate"] arbitrament, final end, and determination, of the said arbitrator, so to be made and published as aforesaid: and that neither party shall bring or prosecute any writ of error, or any action, or suit at law or in equity, against the said arbitrator or against each other respectively, concerning the matters referred by this order: and that if either party shall by affected delay or otherwise wilfully prevent the said arbitrator making his award [" or certificate"], he or they shall pay such costs to the other, as the Court of Queen's Bench shall think reasonable.

Power to direct verdict to be entered.

Power to order what shall be done.

Death of party no revocation.

Power to enlarge time.

Costs of cause to abide event; costs of reference in discretion.

Power to amend record and to certify.

To examine parties.

Witnesses, &c., to be sworn.

Power to call for documents.

Parties to obey award.

Parties not to sue.

Party preventing award to pay costs.

(*l*) See P. 2, ch. 4, s. 1, d. 13, p. 196, as to amending the record.

And lastly, it is ordered that either of the said parties shall be at liberty to move the said Court of Queen's Bench, that this order may be made a rule of that court: and that in the event of either of the said parties disputing the validity of the award ["or certificate"], so to be made and published as aforesaid, or moving the said court to set aside the same or any part thereof, the said Court of Queen's Bench shall have power to remit the matters hereby referred, or any of them, to the re-consideration and determination of the said arbitrator, when and so often as the said court shall see fit (*m*).

Order to be made rule of court.

Court power to refer back.

By the Court.

R. D. Associate.

XIV.

"Middlesex" [*or* "London"] to wit. At the sitting of Nisi Prius, held "at Westminster," [*or* "at the Guildhall in and for the City of London"] on the [ ] day of [ ], in the [ ] year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord [ ], before, &c.

Commencement of order of Nisi Prius at the sittings in Middlesex or London.

XV.

"Before the Right Honorable Thomas Lord Denman, Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen herself."

Style and title of the several judges.

[*Or* "before the Honorable Sir William Wightman, Knight, one of the Justices of our Lady the Queen, assigned to hold pleas before the Queen herself."]

[*Or* "before the Right Honorable Sir Nicholas Conyngham Tindal, Knight, Chief Justice of our Lady the Queen, of her Court of Common Pleas."]

[*Or* "before the Honorable Sir Thomas Coltman, Knight, one of the Justices of our Lady the Queen, of the Bench."]

[*Or* "before the Right Honorable Sir Frederick Pollock, Knight, Chief Baron of our Lady the Queen, of her Court of Exchequer."]

[*Or* "before the Right Honorable Sir James Parke, Knight, one of the Barons of our Lady the Queen, of her Court of Exchequer."]

(*m*) See P. 1, ch. 3, s. 6, d. 4, p. 77, as to submissions by order of Nisi Prius: and for the effect of the particular clauses, see the notes to the clauses in Form I.

XVI.

[*Commence as in the preceding Forms*]

Order of reference, a juror withdrawn.

B. v. D. } It is ordered by the court, by and with the consent of the parties, their counsel, and attornies, that the last juryman sworn and impannelled in this cause be withdrawn out of the pannel, and that this cause and all matters in difference be referred, &c. &c.

XVII.

[*Commence as in Forms XIII. or XIV.*]

Order of reference of cross actions.

A. B. v. C. D. } and C. D. v. A. B. } It is ordered by the court, by and with the consent of the parties, their counsel, and attornies, that in each cause a verdict be entered for the plaintiff, damages mentioned in the several declarations, but that such verdicts shall be subject to the award, &c. &c. [*as in Form XIII.*], who is hereby empowered to direct that a verdict be entered for the plaintiff or the defendant in each cause as he shall think proper, and to whom these causes and all matters in difference between the said parties are hereby referred. [*Continue as in Form XIII., substituting* "causes" *for* "cause" *wherever the word occurs.*]

XVIII.

Order of reference; stranger added.

[*Commence as before in Forms XIII. or XIV., as far as the name of the arbitrator*]—"to whom this cause and all matters in difference between the parties to the same and E. F., or any of them, are hereby referred; to order," &c. &c. [*Continue as in Form XIII., taking care to add a clause for making the order of reference a rule of court. See Form I., clause* 8.]

XIX.

[*Commence as in Forms XIII. or XIV.*]

Order of reference to state a special case.

To be made a special verdict.

B. v. D. } It is ordered by the court, by and with the consent of the parties, their counsel, and attornies, that the jury find a verdict for the plaintiff, damages £4. 4s., and costs forty shillings; subject to the statement of the facts in a special case by X. Y., Esq., barrister-at-law, for the opinion of the Court of Queen's Bench; with liberty to either party to turn it into a special verdict; so as the said X. Y.

do publish the special case ready to be delivered to the said parties, or either of them; or if they, or either of them, shall be dead before the making of the said special case, to their respective personal representatives, requiring the same; on or before the fourth day of Hilary Term next; with liberty for the said X. Y., under his hand in writing at the foot hereof, to enlarge the time for making the said special case.

Death no revocation.

Power to enlarge time.

And it is also ordered by the like consent, that the said X. Y. shall be at liberty, if he shall think fit, to examine the witnesses to the facts in this suit upon oath; and for that purpose the said witnesses to be examined before the said X. Y. touching the matters to be stated shall be sworn before the said X. Y.: and that the said parties shall produce before the said arbitrator all such books, deeds, papers, and writings, in their or either of their custody or power relating to the matters in difference, as the said X. Y. shall think fit to require.

Power to examine on oath.

Power to call for documents.

It is likewise ordered by and with the like consent, that the costs of the special jury shall abide the event.

Costs of special jury.

It is further ordered by the like consent, that if either of the said parties shall, by affected delay or otherwise, wilfully prevent the said X. Y. from drawing up the said special case, or shall not attend after reasonable notice, and without such excuse as the said X. Y. shall be satisfied with, and adjudge to be reasonable; then the said X. Y. may proceed ex parte, and the party occasioning the delay shall pay to the other such costs, as the said court shall think reasonable and just.

Costs for preventing special case.

Power to proceed ex parte.

And, lastly, it is ordered that the said court of our said Lady the Queen before the Queen herself may be prayed, that this order may be made a rule of the same court.

Order to be made rule of court.

By the court.

T. D.
Clerk at the sittings of Nisi Prius.

XX.

[*Commence as in an order of reference at Nisi Prius. See Forms XIII. and XIV.*]

The Queen on the prosecution of A. B. and another against C. D. and twelve others.

It is ordered by the court, by and with the consent of the prosecutors and defendants, their counsel, and attornies, "that the jurors be discharged from giving a verdict" [*or* "that a verdict of guilty be entered against the defendants"], subject to the award, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law [*when a verdict of guilty has been entered, add,* "who is hereby empowered to order the verdict of guilty to be set aside, and a verdict of not guilty to be entered instead thereof, on behalf of all, or any, of the defend-

Order of reference of indictment.

Jurors discharged, or verdict of guilty subject to award.

ants, and"], to whom all matters in difference between the prosecutors and the defendants, or any or either of them, are hereby referred. [*Continue as in Form XIII.*] And it is also ordered, that the costs of the prosecution and defence, and of the reference and award, shall be in the discretion of the said arbitrator, who, &c. [*continue as in Form XIII.*]

Costs of prosecution and defence.

XXI.

Submission by rule of court.

In the "Queen's Bench" [*or* "Common Pleas," *or* "Exchequer of Pleas"].

On the [ ] day of [ ] A. D. [ ].

As yet of [ ] Term, [ ], Victoria (*n*).

A. B. v. C. D. Upon hearing Mr. [ ] of counsel for the plaintiff, and Mr. [ ] of counsel for the defendant, and by their consent, it is ordered, that all matters in difference "in this cause" [*or* "between the parties in this cause," *as the case may be*] be referred to the award, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law; so as, &c. [*as in Form, No. I., clauses* 4, 5, *and* 6.]

Costs. And by the like consent, as aforesaid, it is further ordered, that the costs of the cause shall abide the event of the said award, and that the costs of the reference and of this rule shall be in the discretion of the said arbitrator. [*Instead of this clause, any suitable variation of Form I., clause* 30, 31, *or* 32, *may be adopted.*] And that [*here add such other clauses as are deemed advisable. See Form I.*] (*o*).

By the Court.

XXII.

Order in Chancery referring a suit and all matters in difference.

Master of the Rolls.

Thursday, the [ ] day of [ ], in the eleventh year of the reign of Her Majesty Queen Victoria, 1848.

Between A. B. plaintiff, and C. D. defendant. Upon motion this day made unto this court by Mr. E. of counsel for the plaintiff, it was alleged, that, the plaintiff having exhibited his bill in this court against the defendant, he appeared thereto,

(*n*) If delivered out in vacation the rule will be entitled of the term immediately preceding such vacation. R. G. H. T. 1 Vict. 2, 4.

(*o*) See P. 1, ch. 3, s. 6, d. 2, p. 76, as to submissions by rule of court.

and [*state briefly the stage of the proceedings*]; that the parties have agreed to refer all matters in difference between them to the arbitration of X. Y. and U. V., Esquires, barristers-at-law. And therefore it was prayed that the same may be referred accordingly. Whereupon, and upon hearing Mr. F. of counsel for the defendant, who consented thereto, this court doth by consent order, that this suit and all matters in difference between the parties, be referred to the award, arbitrament, final end, and determination of the said X. Y. and U. V.; who are to make their award in writing on or before the [ ] day of [ ], to be delivered to the said parties, or either of them, who shall require the same; but in case the said X. Y. and U. V. shall not be able to agree concerning the making of the said award, then and in such case, by the like consent, it is ordered, that they be at liberty to choose a third person as an umpire, who is to make his umpirage on or before the [ ] day of [ ], to be delivered to the said parties, or either of them, who shall require the same; which is to be final and conclusive between the parties.

To two arbitrators and an umpire.

And in case the said arbitrators shall not be able to make their award, or the said umpire his umpirage, by the time aforesaid, then such enlargement of the time for making and publishing the said award or umpirage is to be made, as the said arbitrators or umpire shall certify, and this court deem reasonable. And by the like consent, it is ordered that all and every, or any of the parties in this cause, and all and every, or any witness or witnesses to be by them, or any of them respectively produced, (if required by the said arbitrators or umpire, or any of the parties,) be examined upon interrogatories, as the said arbitrators or umpire shall direct; being first sworn before one of the Masters of this court, or before a Master extraordinary: and that all books, vouchers, papers, and writings, in the custody or power of the said parties respectively, relating or touching, or in any wise concerning the matters in difference, be produced to the said arbitrators or umpire. And by the like consent the costs of this suit, and of this reference, and relating thereto, are to be at the discretion of the said arbitrators or umpire. And by the like consent neither the plaintiff or defendant are to prosecute any action at law, or suit in equity, or commence any suit whatever against each other, or against the arbitrators or umpire, of and concerning the premises so as aforesaid referred. And by the like consent it is ordered, that either of the parties be at liberty to apply to this court to have the award or umpirage, to be made in pursuance of this reference, made an order of this court (*p*).

Power to enlarge.

Witnesses examined on interrogatories.

Award may be made order of court.

(*p*) See P. 1, ch. 3, s. 7, d. 1, p. 90, as to submissions of a suit in equity.

XXIII.

Submission by order of Chancery of charity suit, &c.

[*After stating the title, proceed.*]—his lordship doth order, by consent of the Attorney-General, and of the relators, and plaintiffs, and of the defendants, that the said causes and all matters in difference between the said parties, respecting the subject-matters of the information in the said causes mentioned, be referred to the award of X. Y., of [ ], barrister-at-law; with liberty for him to consider and determine, as the Attorney-General might have done, whether the supplemental information be properly filed, and be properly framed; with power for him to direct what is proper to be done between the parties in the premises; so as the said X. Y. make his award on or before the first day of Easter Term, 1838, to be delivered to the parties in the said suits, or any of them, who shall require the same; with power to the said X. Y. to enlarge the time for making his said award. And by the like consent, it is ordered, that the costs of the said suits, and of the reference, and relating thereto, shall be in the discretion of the said arbitrators. And by the like consent, it is ordered, that the death of any of the said parties shall not operate as a revocation of the authority of the said arbitrator, but that his award shall be delivered to the personal representatives of the deceased party or parties; and none of the said parties shall be at liberty to revoke or determine the reference hereby made, &c.

Parties not at liberty to revoke.

XXIV.

Demand of arbitration for compensation under the Lands Clauses Consolidation Act.

Recital notice lands required.

Amount of compensation offered.

Dispute respecting amount.

Whereas I, A. B., of [ ], received notice in writing from the "[ ] Railway Company," [*or the promoters of the public undertaking, naming them by their proper title,*] that they required for the purposes of their "railway" [*or other public undertaking*] the lands and tenements specified in the said notice, comprising the lands and tenements specified in the underwritten schedule, and that they were willing to treat for the purchase of the same, and that they intended to take the same pursuant to the powers given them by certain acts of parliament. And whereas the said "company" [*or the promoters*] have offered me the sum of £ [ ], and no more, as the purchase money and compensation for my interest in the lands and tenements so intended to be taken, and for the damage that may be sustained by me by reason of the execution of the works connected with the said "railway" [*or other public undertaking*]. And whereas I am not satisfied with that amount, and do not agree to receive and accept the same as sufficient compensation, and a dispute has arisen between me and the said "railway company" [*or other promoters*] respecting the same. [*If no sum have been offered by*

the promoters, leave out the above paragraph, and say, " and whereas a dispute has arisen between me and the said " railway company" [*or other promoters*] respecting the amount of purchase money and compensation to be paid me for my interest in the said lands and tenements, and for the damage that will be sustained by me by reason of the execution of the works connected with the said " railway " (*or other undertaking*)"]. And whereas the said " company " [*or the promoters*] have not yet issued their warrant to the sheriff to summon a jury in respect of such lands :—I hereby state, that I am interested in the lands and tenements set out and described in the first division of the said schedule, as tenant in fee simple, and in the lands and tenements set out and described in the second division of the said schedule, as tenant for years of the same, under a lease from H. K. of [ ], for fourteen years from " Michaelmas Day, A. D. 1841," [*or as the case may be, taking care to show the interest and the length of the term unexpired.*] And I claim in respect of such my interest in the said lands and tenements the sum of £ [*a sum exceeding fifty pounds*], as purchase money and compensation; regard being to be had not only to the lands and tenements so intended to be taken, but also to the damage, which I shall sustain by reason of the severing of the lands and tenements intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers of the acts above referred to, or of any acts incorporated therewith. And I hereby give notice to the said " company " [*or promoters*] that I desire to have the amount of such compensation settled by arbitration, pursuant to the provisions of The Lands Clauses Consolidation Act, 1845. And I request the said " company " [*or promoters*] to nominate and appoint an arbitrator on their part, to whom, together with an arbitrator to be appointed and nominated by me, the dispute respecting the amount of such compensation shall be referred.

Statement of interest in the lands.

Amount of compensation claimed.

Demand of arbitration.

Requesting promoters to appoint an arbitrator.

The [ ] day of [ ], A. D. [ ].

A. B.

To " the [ ] Railway Company," [*or the promoters of, &c. as the case may be*].

Schedule [*here specifically describe the lands.*]

XXV.

(*q*) Whereas I, A. B., am " the owner in fee of a certain messuage and premises, called [ ], with the appurtenances," [*or*, " possessed of a certain farm and premises, with the appurtenances, called [ ], for the residue yet unexpired of a term of fourteen years, from Michael-

Demand of arbitration respecting compensation for

(*q*) See 8 & 9 Vict. c. 18, s. 68.

premises injured by making a railway, &c.

mas, 1841." [*Or otherwise describe the particular premises, and the interest of the party,*] situate at [ ], in the parish of [, in the county of [ ]. And whereas my said lands and premises have been injuriously affected by the execution of the works of the [*here state the name of the railway, or other public undertaking*] in the manner following, that is to say, [*here state shortly the nature of the injury*]. And whereas I am entitled to compensation in respect of such injury. And whereas you the [*the railway company or the promoters*] have not made me satisfaction for the same:—I hereby give you notice; that I claim the sum of £ [*a sum exceeding fifty pounds*], as compensation for the aforesaid injury; and, that unless, within twenty-one days after the receipt of this notice, you pay the said amount, or enter into a written agreement to pay the same, I desire to have the amount of such compensation settled by arbitration, and request you to appoint an arbitrator, to whom, together with an arbitrator to be appointed by me, the question as to such compensation shall be referred.

The [ ] day of [ ], A. D. [ ].

A. B.

To the [*the railway company or other promoters*].

XXVI.

Appointment of arbitrator under the Lands Clauses Consolidation Act.

Recital, notice lands required.

Whereas, under the provisions of the "North Staffordshire Railway (Pottery line) Act, 1846," and the "North Staffordshire Railway (Churnet Valley line) Act, 1846," and of certain other acts incorporated therewith, the North Staffordshire Railway Company are entitled to take, and have given due notice in writing to Messrs. J. H., S. B., and J. G., of [ ], in the county of Stafford, coalmasters, that they require for the purpose of the railway part of certain wharf land and tenements, situate in the parish of Stoke upon Trent, in the said county; in which the said Messrs. J. H., S. B., and J. G. are interested: which said land and tenements are specifically described in the said notice, and also in the "underwritten" [*or* "annexed"] schedule: and whereas the said company have offered

Compensation offered, refused.

to the said Messrs. J. H., S. B., and J. G., the sum of £ [ ], as compensation in respect of the said land and tenements: and whereas the said Messrs. J. H., S. B., and J. G., are not satisfied therewith, and

Demand of arbitration.

have required that the amount of such compensation should be determined by arbitration: now these presents witness, that "the said North Staffordshire Railway Company," [*or*, "the said Messrs. J. H., S. B., and J. G,"] pursuant to the provisions of the said recited acts, and of "The Lands Clauses Consolidation Act, 1845," and of the other acts

Appointment of arbitrator,

incorporated with the said recited acts, do hereby appoint "G. M'D. of [ ], in the said county, mining agent," [*or* "J. H. B., of

[ ], in the said county, surveyor,"] to be an arbitrator to settle and determine the amount of purchase money and compensation to be paid by the said North Staffordshire Railway Company to the said Messrs. J. H., S. B., and J. G., in respect of their interest in the said land and tenements so intended to be taken as aforesaid, and for the damage that may be sustained by them by reason of the execution of the works of the said railway; regard being had by the said arbitrator not only to the land and tenements so intended to be taken; but also to the damage, if any, to be sustained by the said Messrs. J. H., S. B., and J. G., by reason of the severing of the land and tenements so intended to be taken from the other lands and tenements of the said Messrs. J. H., S. B., and J. G.; or otherwise injuriously affecting such other lands and tenements by the exercise of the powers of any of the said acts. Subject matter of reference.

Dated this [ ] day of [ ], A. D. [ ]

W. T. C. } Directors of the North Staffordshire
J. R. } Railway Company.

[*Or* O. P. Secretary of the North Staffordshire Railway Company.]

[*Or when the appointment is by the landowners*] J. H.
S. B.
J. G.

Schedule to the above

[*Here specifically describe the premises to be taken.*] Schedule.

XXVII.

In pursuance of the provisions of "The East and West India Docks and Birmingham Junction Railway Act, 1846," and of "The Lands Clauses Consolidation Act, 1845," incorporated therewith; the East and West India Docks and Birmingham Junction Railway Company, do, by this writing under the hand of their secretary, nominate and appoint F. F., of [ ], land surveyor, to be the arbitrator on their behalf in a question of disputed compensation, to be made by the said company to J. L., of [ ], in the county of Middlesex, for his interest in the lands and hereditaments specified in the schedule hereunder written, (which are required to be purchased by the said company,) and for the damage to be sustained by the said J. L. in the execution of the works of the said railway. Dated the first day of May, one thousand eight hundred and forty-seven. Appointment of arbitrator by a railway company under the Lands Clauses Consolidation Act.

H. C.
Secretary to the said company.

Schedule above referred to.

A piece or parcel of land as now staked and set out for the purposes of the before-mentioned railway; together with all houses buildings, timber and other trees, hedges, fences, ways, rights, members, and appurtenances thereto belonging; situate and being in the parish of St. John's, South Hackney, in the county of Middlesex; and containing by admeasurement one acre, two roods, and nineteen perches, or thereabouts, be the same a little more or less; being part of several closes or parcels of land and hereditaments comprised in the plan of the said railway, deposited with the clerk of the peace for the county of Middlesex, and referred to by the before-mentioned act of parliament, and described in the book of reference deposited with the said plan, and also referred to by the said act as under.

Parish of St. John, South Hackney, in the County of Middlesex.

No. on Plan	Description of Property.	Owner or Reputed Owner.	Lessee.	Occupier.
35	Pasture.	The Rev T. M. and J. L.	——	J. L.

XXVIII.

Appointment of single arbitrator to act for both parties, the promoters refusing to appoint an arbitrator.

Whereas the "[ ] Railway Company" [*or other promoters, as the case may be,*] lately gave me notice in writing that they required to take, for the purposes of their "railway," [*or other undertaking, following the terms of the notice,*] certain lands and tenements specified in the said notice, and in the underwritten schedule.

Recital, notice lands required. Dispute as to amount of compensation.

And whereas a dispute arose between me and the said "[ ] Railway Company" [*or the promoters*] respecting the amount of purchase money and compensation to be paid to me by them, for my interest in the said lands and tenements, and for the damage that might be sustained by me by reason of the execution of the works of the said "railway;" [*or other undertaking;*] regard being to be had, not only to the lands and tenements so intended to be taken, but also to the damage, if any, to be sustained by me, by reason of the severing of the lands and tenements so intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers given them by the Lands Clauses Consolidation Act, 1845, or by their special act, or by any act incorporated therewith.

Notice demanding arbitration and appoint.

And whereas, before they issued their warrant to the sheriff to summon a jury in respect of such lands and tenements, I served them with a notice in writing, signifying my desire to have the amount of such com-

pensation settled by arbitration; and stated in such notice the interest in respect of which I claimed compensation, and the amount of compensation which I claimed; and requested them by such notice to appoint an arbitrator to determine such dispute; and stated in such notice the matter required to be referred to arbitration. And whereas the space of fourteen days has elapsed since the said dispute arose, and since the service of the last-mentioned written notice and request; and the said "company" [*or* "promoters"] have failed to appoint an arbitrator. And whereas I have previously appointed J. H. B., of [ ], to be an arbitrator to determine such dispute:—I now hereby, in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, and of the acts above referred to, appoint the said J. H. B. to act on behalf both of me and of the said company, in hearing and determining the said dispute.

Appointment of arbitrator.

Failure of promoters to appoint.

Appointment of arbitrator to act for both parties.

Dated the [ ] day of [ ], A. D. [ ].

A. B.

Schedule.

[*Here specify the lands, as in the original appointment of the arbitrator.*]

XXIX.

(*r*) Whereas the [*the railway company, or other promoters of the undertaking*] "in consequence of my absence from the kingdom," [*or* "in consequence of my not having been found by them"] procured a valuation to be made under the Lands Clauses Consolidation Act, of the compensation to be paid in respect of my estimated interest in the lands and premises described in the underwritten schedule; and have deposited the amount of such valuation, being the sum of £ [ ], in the Bank of England, pursuant to the provisions of the above statute: and whereas I am dissatisfied with such valuation, and have given the said [*railway company or promoters*] due notice in writing, requiring that the question of such compensation shall be submitted to arbitration, and calling upon them to appoint an arbitrator:—I hereby appoint O. P., of [ ], an arbitrator, to determine, whether the said sum so deposited as aforesaid by the said [*the railway company or other promoters*], was a sufficient sum; or whether any, and what further sum, ought to be paid or deposited by them.

Appointment of arbitrator by party dissatisfied with surveyor's valuation.

The [ ] day of [ ], A. D. [ ].

A. B.

(*r*) See 8 & 9 Vict. c. 18, ss. 58, 59, 64, 65.

XXX.

Appointment of umpire by arbitrators indorsed on submission.

We, the written named U. V. and X. Y., do hereby nominate and appoint Q. R., of [ ], to be the umpire, pursuant to the within contained provisions. [*It is better to add,* " provided he will accept such office."] As witness our hands this [ ] day of [ ], A. D. [ ] (*s*).

Witness, U. V.
O. P. X. Y.

XXXI.

Appointment of an umpire by arbitrators.

Pursuant to the powers given to us " by an agreement of reference, made on the [ ] day of [ ], A. D. [ ]," [*or* " by the agreement of reference contained in the condition of two mutual bonds, made and executed on the [ ] day of [ ], A. D. [ ], by A. B., of [ ], and C. D., of [ ], respectively, each to the other;" *or* " by an order of Nisi Prius, made on the [ ] day of [ ], A. D. [ ], in a cause in which A. B. was plaintiff and C. D. defendant,"] we, the thereby appointed arbitrators, do by these presents nominate and appoint Q. B., of [ ], to be the umpire, according to the provisions of the above-mentioned " agreement of reference," [*or* " bonds of submission," *or* " order of Nisi Prius,"] provided he be willing to accept such office.

As witness our hands this [ ] day of [ ], A. D. [ ].

Witness, U. V.
O. P. X. Y.

XXXII.

Appointment of umpire by the arbitrators under the Lands Clauses Consolidation Act.

We,—the undersigned G. M'D., of [ ], in the county of Stafford, mining agent, appointed an arbitrator by and on behalf of the North Staffordshire Railway Company; and the undersigned J. H. B., of [ ], in the said county, surveyor, appointed an arbitrator by and on behalf of Messrs. J. H., S. B., and J. G.; pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, and the North Staffordshire Railway (Pottery line) Act, 1846, and the North Staffordshire Railway (Churnet Valley line) Act, 1846, and of the other acts incorporated with the two last recited acts; to settle and determine the amount of purchase money and compensation to be paid by the North Staffordshire

(*s*) See P. 2, ch. 4, s. 4, p. 214, as to appointing an umpire.

Railway Company to the said Messrs. J. H., S. B., and J. G., in respect of their interest in the lands and hereditaments specifically described in the underwritten schedule, intended to be taken by the said company for the purposes of their railway, and in respect of the damage to be sustained by them by reason of the execution of the works of the railway: regard being to be had by us, not only to the said lands and hereditaments so intended to be taken; but also to the damage, if any, to be sustained by the said Messrs. J. H., S. B., and J. G., by reason of the severing of the lands and hereditaments so intended to be taken from the other lands and hereditaments of the said Messrs. J. H., S. B. and J. G.; or otherwise injuriously affecting such other lands and hereditaments by the exercise of the powers of any of the acts above referred to:—do hereby, before entering upon the matters referred to us, nominate and appoint A. L. B., of [ ], in the county of Lancaster, mine agent, to be the umpire in the matter of the said arbitration, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845. As witness our hands this [ ] day of [ ], A. D. [ ].

G. M'D.
J. H. B.

Schedule. [*Here specify the lands.*]

XXXIII.

Appointment of umpire by Justices or the Commissioners of Railways under the Lands Clauses Consolidation Act.

Whereas the arbitrators appointed by the [*state the name and title of the railway company or promoters of the public undertaking*] and A. B., respectively, pursuant to the Lands Clauses Consolidation Act, 1845, and the [*here state the special act*]; to settle and determine the amount of purchase-money and compensation to be paid by the said [*railway company or the promoters*] to the said A. B., in respect of his interest in the lands and premises specifically described in the under-written schedule, intended to be taken by the said [*railway company or the promoters*] for the purposes of their [*the undertaking*], and in respect of the damages to be sustained by him by reason of the execution of the works of the said [*railway or undertaking*]; regard being to be had by them, not only to the lands and premises so intended to be taken; but also to the damage (if any) to be sustained by the said A. B. by reason of the severing of the lands and premises so intended to be taken from the other lands and premises of the said A. B.; or otherwise injuriously affecting such other lands and premises by the exercise of any of the powers of the said acts; "have refused" [*or* "have for seven days after request from the said (*the promoters or the land-owner, as the case may be*) neglected"] to appoint an umpire: and whereas application has been made by the said [*the promoters or the land-owner, as the case may be*]* "unto us, O. P. and Q. R., two of her Majesty's justices of the peace in and for the

county of [*county in which the lands are situated*], assembled and acting together, and not being interested in the matter, to appoint an umpire:—we, the said O. P. and Q. R., being such justices as aforesaid, and so assembled and acting together, and not being interested in the matter, do hereby appoint [*in the case of a railway company, where the appointment is to be bythe Railway Commissioners*(t), *substitute for the sentence after the asterisk*, "to the commissioners of railways to appoint an umpire, the said commissioners do hereby appoint"] S. T. of [ ] to be the umpire to determine in the matter of the said arbitration pursuant to the provisions of the Lands Clauses Consolidation Act, 1845.

The [ ] day of [ ], A. D. [ ].

O. P. } Justices of the peace, acting in and
Q. R. } for the county of [ ].

[*Or signatures of two of the commissioners of railways, and seal of the commissioners.*]

Schedule [*here specifically describe the lands, &c.*]

XXXIV.

Appointment by the two arbitrators of a third arbitrator.

[*Commence as in Forms XXX. or XXXI.*]—do by this memorandum in writing under our hands, made before we have entered upon the consideration of the matters referred, nominate and appoint Q. R. of [ ], to be the third arbitrator to act with us in the consideration and determination of the same, according to the provisions of the "above-mentioned" [*or* "within-contained"] "agreement of reference" [*or* "bonds of submission," *or* "order of Nisi Prius"] (u).

As witness our hands the [ ] day of [ ] A. D. [ ].

Witness. U. V.
O. P. X. Y.

XXXV.

Warrant of attorney in ejectment to enforce delivery of lands, if awarded.

To P. A. and D. A., gentlemen, attornies of her Majesty's "Court of Queen's Bench," [*or* "Common Pleas," *or* "Exchequer of Pleas"], at Westminster, jointly and severally, or to any other attorney of the same court.

These are to desire and authorize you, the attornies above-named, or any one of you, or any other attorney of the "Court of Queen's Bench" [*or* "Common Pleas," *or* "Exchequer of Pleas"] aforesaid, to appear for me, C. D. of [ ], in the said court, forthwith, or at any time or

(t) Substituted for the Board of Trade as to matters concerning railways, by the stat. 9 & 10 Vict. c. 105, s. 2.

(u) See P. 2, ch. 4, s. 3, p. 206, as to joint arbitrators.

times hereafter,* and then and there to receive a declaration for me in an action of trespass and ejectment at the suit of John Doe on the demise of A. B. [*select such of the following descriptions of property as are applicable*] for [ ] messuages, [ ] dwelling-houses, [ ] cottages, [ ] barns, [ ] stables, [ ] outhouses, [ ] yards, [ ] gardens, [ ] orchards, [ ] acres of arable land, [ ] acres of meadow land, [ ] acres of pasture land, [ ] acres of land covered with wood, [ ] acres of land covered with water, and [ ] acres of other land, with the appurtenances, situate in the parish of [ ], in the county of [ ]; which the said A. B., on the [ ] day of [ ], A. D. [ ], had demised to the said John Doe for the term of [ ] years from thence next ensuing, and fully to be complete and ended; and thereupon to confess the same action, or else to suffer judgment by nil dicit, or otherwise, to pass against me in the said action, and to be thereupon forthwith entered up against me of record in the same court, for the recovery of the said term yet to come of and in the said tenements, with the appurtenances, and also for the recovery of £ [ ] damages, besides costs of suit. And I, the said C. D., do hereby further authorize and empower you, the said attornies, or any one of you, or any other attorney as aforesaid, after the said judgment shall have been entered up as aforesaid, for me and in my name and as my act and deed, to sign, seal, and execute a good and sufficient release, or good and sufficient releases in the law, to the said John Doe and the said A. B., or either of them, or the heirs, executors, administrators, or assigns of them or either of them; of all and all manner of error and errors, and writ and writs of error, and all benefit and advantage thereof, and all misprision of error and errors, defects and imperfections whatsoever, had, made, committed, done, or suffered, in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning, any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, of or in anywise concerning the same: and for what you, the said attornies, or any of you, shall do or cause to be done in the premises, or any of them, this shall be to you, or any of you, a sufficient warrant and authority.

Authority to enter judgment in ejectment forthwith.

In witness whereof I have hereunto set my hand and seal, the [ ] day of [ ], in the year of our Lord [ ].

C. D. (L. S.)

Signed, sealed, and delivered by C. D. in the presence of, and witnessed by, me D. A. of [ ], attorney of the court of [ ], as the attorney of the said C. D. expressly named by him, and attending at his request, to inform him of the nature and effect hereof before the same was executed; and I hereby declare myself to be such attorney for the said C. D., and I subscribe myself as such attorney, having first in-

Attestation.

formed him of the nature and effect of this warrant of attorney, before he executed the same.

D. A.

Defeasance.

Recital of reference.

Party in possession of the lands.

Judgment to be security for performance of award.

No execution unless arbitrator award delivery of land.

On refusal to obey award, execution to recover land awarded.

Not necessary to revive judgment though year elapsed.

Whereas [*here recite the substance of the submission to reference respecting the title or possession of the lands*]; and whereas the said [messuages, lands, &c. &c.] are now in the occupation or possession of the said C. D. Now it is hereby agreed and declared, that the judgment so to be entered up against the said C. D. in pursuance of the above-written warrant of attorney, is intended and agreed to be a security to the said A. B., his heirs, executors, administrators, and assigns, for the due performance by the said C. D., his heirs, executors, administrators, and assigns, of the award to be made by the said arbitrator respecting the lands and tenements aforesaid; and that no execution or executions shall be issued or taken out upon the said judgment, unless the arbitrator shall by his award direct the said C. D., or his heirs, executors, administrators, or assigns, to deliver up to the said A. B., or to his heirs, executors, administrators, or assigns, possession of the said lands and tenements, or of some part thereof; and the said C. D., his heirs, executors, administrators, and assigns, shall refuse or neglect to deliver up possession of the same pursuant to the directions of the award: and that in case and when such refusal and neglect shall take place, it shall be lawful for the said A. B., his heirs, executors, administrators, or assigns, to sue out execution or executions upon or by virtue of the said judgment, and by means of such execution or executions to obtain and recover possession of so much of the said lands and tenements as the award shall direct to be delivered up as aforesaid.

And it is further declared and agreed that it shall not be necessary for the said A. B., his heirs, executors, administrators, or assigns, to revive or cause to be revived the said judgment, although the same shall have been entered of record for the space of one year and upwards: and that the said C. D., his heirs, executors, and administrators, shall not nor will have, receive, or take, any plea, exception, proceeding, or other benefit, from the omission of the said A. B., his heirs, executors, administrators, or assigns, to keep on foot or revive the said judgment, although the same shall have been entered for a year or upwards: and that if the said C. D., his heirs, executors, and administrators, shall attempt so to do by action or other legal proceeding or proceedings whatsoever, this present agreement shall and may be pleaded or shown in bar thereto, any rule or practice of the courts, or of any one of them, to the contrary thereof in anywise notwithstanding. As witness the hands of the said parties the day and year above written (*x*).

Witness, C. D.

D. A. A. B.

(*x*) See P. 1, ch. 3, s. 1, d. 2, p. 50, as to taking collateral security for performance of the award.

XXXVI.

[*The heading and commencement are the same as in the preceding Form XXXV. as far as the asterisk*]—and then and there to receive a declaration for me in an action of debt for £ [ ], [*state a sum about double the amount likely to be awarded*] for money borrowed, at the suit of A. B. of [ ], his executors or administrators; and thereupon to confess the same action, or else to suffer a judgment by nil dicit, or otherwise, to pass against me in the same action, and to be thereupon entered up against me of record in the said court for the said sum of £ [*the sum above mentioned*], beside costs of suit. And I, the said C. D., do hereby further authorize and empower you, the said attornies, or any of you, after the said judgment shall be entered up as aforesaid; for me and in my name, and as my act and deed, to sign, seal, and execute a good and sufficient release in law to the said A. B., his heirs, executors, and administrators, of all and all manner of errors [*continue as in above precedent*]. Warrant of attorney to enforce payment of money awarded. To enter judgment in debt forthwith.

Whereas [*here recite the substance of the submission, as for instance*] by a certain agreement in writing, made the [ ] day of [ ], between the said A. B. and the said C. D., reciting that certain differences had arisen between them as to whether the said C. D. was indebted to the said A. B. in any, and if any, in what amount of money; it was agreed by and between the said parties to refer all matters in difference between them to the final determination and award of X. Y. of [ ], barrister-at-law. Now it is hereby declared that the judgment so to be entered up in pursuance of the above written warrant of attorney, is agreed and intended to be a security to the said A. B. for the payment to him of such sum, as the arbitrator shall award to be due from the said C. D. to the said A. B., with interest from the date of the making of the award until the issuing of execution: and that no execution shall be issued or taken out upon the said judgment, unless the arbitrator shall award a sum to be due from the said C. D. to the said A. B.; and that if the arbitrator shall so award, then it shall be lawful for the said A. B., his executors, administrators, or assigns, to sue out execution by virtue of the said judgment, and to levy the amount awarded due, with interest at five per cent. on the same from the time of making the award until the suing out of execution. [*Conclude as in the preceding Form from* "And it is further declared and agreed," *leaving out all mention of the heirs of A. B.*] Defeasance. Recital of reference. Judgment to be security for amount awarded, with interest. No execution unless sum awarded. Execution to issue for amount awarded, with interest.

PROCEEDINGS DURING THE REFERENCE.

XXXVII.

Appointment for a meeting in the reference.

B. v. D. } (a) I appoint [*Monday*], the [*third*] day of [*January*] next, for proceeding in this reference, at the hour of [*eleven*] o'clock [*in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*] (b).

[*Dec.* 22, 1847.]

X. Y.
Arbitrator.

To Messrs. E. and T. attornies for A. B.,
and to Mr. G. H., attorney for C. D. (c).

XXXVIII.

Appointment for two meetings.

B. v. D. } I appoint [*Monday*], the [*third*] and [*Wednesday*], the [*fifth*] days of [*January*] next, for proceeding in this reference, at [*my chambers, No. 2, Fig Tree Court, Temple*], at the hour of [*eleven o'clock in the forenoon, on the Monday*], and of [*seven o'clock in the evening, on the Wednesday*].

Dec. 22, 1847.

X. Y.
Arbitrator.

To Messrs. E. and F., attornies for A. B.,
and to Mr. G. H., attorney for C. D.

(a) See P. 2, ch. 4, s. 1, d. 2, p. 168, as to giving appointments.

(b) Instead of heading the appointment thus, it may sometimes be convenient to entitle it, "In the matter of the arbitration between A. B. and C. D.," &c., especially when there are more parties to the reference than two.

(c) If a party do not appear by attorney, but conduct his case personally, the notice should be addressed to the party himself.

XXXIX.

B. v. D. } (*d*) I appoint [*Monday*], the [*third*] day of [*January*] next, peremptorily, for proceeding in this reference, at the hour of [*eleven o'clock in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*]. Peremptory appointment.

Dec. 22, 1847.

X. Y.
Arbitrator.

To Messrs. E. and F., attorneys for A. B.,
and to Mr. G. H., attorney for C. D.

XL.

B. v. D. } I appoint [*Monday*], the [*third*] day of [*January*] next, for proceeding in this reference, at the hour of [*eleven o'clock in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*]: and I give notice that in case "either party" [*if one party only be delaying, say* "you, A. B."] fail to attend without having previously shown to me good and sufficient cause "for his absenting himself," [*or* "for your absenting yourself"], I shall at the request of "the party" [*or* "C. D. if"] present go on with the reference ex parte. Appointment with notice, arbitrator will proceed ex parte.

The [ ] day of [ ], A. D. [ ].

To Messrs. A. B. and C. D.
[*or* to Mr. A. B.]

X. Y.

XLI.

In the "Queen's Bench," [*or* "Common Pleas," *or* "Exchequer of Pleas"].

"Between A. B. plaintiff, and C. D. defendant." [*If there be no cause in court, instead of the above, say,* "In the matter of the arbitration between A. B. and C. D."] Affidavit for attendance of witness.

O. P. of [ ], [attorney for the said A. B.] maketh oath, and saith [*here recite the submission shortly, for instance*] "that by a certain order of Nisi Prius [*if the order be annexed, say* "herewith annexed"] made in a cause, in which the said A. B. is plaintiff and the said C. D. defendant, the said cause and all matters in difference between the said par-

(*d*) See P. 2, ch. 4, s. 1, d. 11, p. 191, as to proceeding ex parte.

ties were referred to the award of X. Y. of [ ]," [*or* " that by a certain agreement in writing the said A. B. and C. D. agreed to refer certain differences to the award of X. Y. of [ ], and further agreed that their submission to arbitration should be made a rule of this court"] ; and that the said X. Y. has taken upon himself the burthen of the said reference, and has made and signed an appointment in writing [*if the appointment be annexed, say* " herewith annexed," *if only a copy be annexed, say* " a true copy whereof is hereto annexed"] for a meeting upon the said reference (*if neither original nor copy be annexed, say,* " for a meeting upon the said reference, on the [ ] day of [ ] next, at [ ], at the hour of [ ] o'clock in the [ ]").

And this deponent further saith, that G. H. of [ ], who now resides at [ ], in the county of [ ] [*or if the witness cannot be found, say so, and also state the facts to satisfy the court that such is the case*], is a necessary and material witness for the said A. B. touching the matters referred as aforesaid ; and that it is necessary that the said G. H. should attend to be examined and give evidence before the said arbitrator at the time and place appointed for the said meeting in the reference.

[*If the witness be required to produce documents, say*] And this deponent further says, " that the said G. H." [*or* " that he has been informed and verily believes that the said G. H."] has in his possession or control a certain [*here describe the document or documents*] ; and that it is necessary and material for the case of the said A. B. that the said G. H. should produce the said " documents" to be read in evidence before the said arbitrator at such meeting as aforesaid ; and that the said G. H. has not, as this deponent believes, any just cause or reason for refusing to produce the said " documents" (*e*).

Sworn, &c. O. P.

XLII.

Certificate of attorney for attendance of witnesses.

[*Entitle the certificate as in the preceding Form*].—I hereby certify that G. H. of [ ], who resides at [ ], in the county of [ ], [*or* " who cannot now be found," *stating facts as in the preceding Form*], is a necessary and material witness on the part of the said A. B. touching the matters referred ; and that it is necessary that the said G. H. should attend before Mr. X. Y., the arbitrator, on the [ ] day of [ ], at [*place of meeting*], at the hour of [ ] o'clock in the [ ] ; at which time and place the arbitrator has by a writing signed by him appointed a meeting to be held in the reference [*if the*

(*e*) See P. 2, ch. 4, s. 1, d. 3, p. 173, as to enforcing attendance of witnesses.

witness is to produce documents, add]; and that the said G. H. should, at the time and place aforesaid, produce before the arbitrator a certain [*here describe the documents as in a subpœna duces tecum*].

Dated the [ ] of [ ].

O. P.
Attorney for the above-named A. B.

XLIII.

Judge's order for attendance of witness.

B. v. D. } " Upon reading the certificate of O. P., attorney for " the plaintiff," [*or* " A. B."]," [*or* " upon reading the affidavit of O. P., and the order of Nisi Prius, and paper writing and appointment thereto annexed"], I order and command that " G. H." [*or* " you G. H."] of [ ], do attend before X. Y., Esq., the arbitrator herein, on the [ ] day of [ ], at [*place of meeting*], at [ ] o'clock in the [ ]; and do then and there submit to be examined upon oath or affirmation on behalf of the " said plaintiff " [*or* " said A. B."] touching the matters referred to the said arbitrator [*if the witness is to produce documents, add*] and that " the said G. H." [*or* " you"] bring with " him" [*or* " you"] and produce before the said arbitrator at the said time and place a certain [*here specify the documents as in a subpœna duces tecum*], pursuant to the statute.

Dated [ ] day of [ ], A. D. [ ] (*f*).

[*Judge's signature.*]

XLIV.

Memorandum for jurat of witnesses.

In the " Queen's Bench" [*or* " Common Pleas," *or* " Exchequer of Pleas"].

Between A. B. plaintiff, and C. D. defendant.

Jurat for plaintiff.

A. B. plaintiff.

G. H.
I. K.
L. M. } witnesses.

By " rule of court," [*or* " judge's order," *or* " baron's order," *or* " order of Nisi Prius"]. Dated the [ ] day of [ ], A. D. [ ] (*g*).

O. P., plaintiff's attorney.

(*f*) See P. 2, ch. 4, s. 1, d. 3, p. 173, as to enforcing attendance of witnesses.

(*g*) See P. 2, ch. 4, s. 1, d. 5, p. 176, as to swearing witnesses.

XLV.

Jurat of witnesses.

In the "Queen's Bench," [*or* "Common Pleas," *or* "Exchequer of Pleas"].

A. B. against C. D.

G. H of [ ].
I. K. of [ ].
L. M. of [ ], &c.

On the [ ] day of [ ], the above [ ] witnesses were severally sworn "in court" [*or if before a judge, say,* "before me at my chambers in Rolls Garden"] to give evidence before the arbitrator to whom this cause stands referred.

G. H.
I. K.
L. M., &c.

By the Court [*if sworn before a judge, the signature of the judge instead*].

XLVI.

Form of oath to be used by the arbitrator.

The evidence which you shall give before me the arbitrator, touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth; so help you God.

XLVII.

Another form of oath.

You shall true answers make to all such questions as shall be asked of you touching the matters in difference in this reference; so help you God.

XLVIII.

Form of affirmation.

I, A. B., being [*or* "having been"] one of the people called Quakers [*or* "one of the united brethren called Moravians"] [*or* "being a Separatist"], do solemnly, sincerely, and truly affirm and declare,* that the evidence which I shall give before you, the arbitrator, touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth.

XLIX.

Another form of affirmation.

[*Commence as in the preceding Form XLVIII. as far as the asterisk, and then continue*]—that I will true answers make to all such questions as shall be asked of me touching the matters in difference in this reference.

L.

Demand by arbitrator of production of documents.

In the matter of the arbitration between A. B., C. D., and E. F.

Sir,

In pursuance of the power given to me by the "order of reference" [*or other submission, as the case may be*], I require you to produce before me on Monday, the third day of January next, at the hour of eleven o'clock in the forenoon, at my chambers, Farrar's Buildings, Inner Temple, the following documents relating to the matters in this reference, that is to say, [*here enumerate the books, deeds, papers, and writings demanded, specifying and describing each with a reasonable degree of particularity as far as is practicable. It may often also be advisable to add,* "and also all other books, deeds, papers, and writings, concerning the matters in difference referred to my decision"] (*h*).

Dec. 22, 1847. X. Y.

To Mr. A. B. (*i*). Arbitrator.

LI.

Request by arbitrator of a written statement of the matters in difference.

Gentlemen,

In order that in forming my award I may not omit duly to estimate every matter which is deemed of importance, I request you respectively to furnish me with a statement in writing of the particular matters (other than those included in the cause referred), which you desire me to take into my consideration as matters in difference in this reference (*k*).

The [ ] day of [ ] A. D. [ ].

Yours truly,

X. Y.

To Mr. A. B. ["*or* Mr. G. H., attorney to Mr. A. B.,' and to Mr. C. D. ["*or* Mr. I. K., attorney to Mr. C. D."]

LII.

Notice by arbitrators to umpire of final disagreement.

Sir,

We hereby give you notice that we cannot and shall not be able to agree in making an award, but have finally disagreed about the same,

(*h*) See P. 2, ch. 4, s. 1, d. 8, p. 184, as to the arbitrator's power to call for documents.

(*i*) A copy of this notice should be served personally, as in the case of a demand of performance of an award, whenever there is any doubt of the party's willingness to comply with it; for the courts, it is presumed, would not enforce obedience by attachment unless there were a personal service, with the requisite formalities.

(*k*) See P. 2, ch. 4, s. 1. d. 15, p. 198, as to requiring statement in writing of matters in difference.

and that you are at liberty to proceed as umpire to consider and award upon the matters referred (*l*).

The [ ] day of [ ], A. D. [ ].

U. V.
X. Y. } Arbitrators.

To Q. R., Esq., umpire.

LIII.

Enlargement of time by arbitrator.

I enlarge the time for making my award respecting the matters referred to me by the (*if the enlargement of time is to be indorsed on the submission, say,* "within order of reference" [*or other submission*] *if it is to be written at the foot of the submission, say* "above order of reference" [*or other submission*]), until the [ ] day of [ ], A.D. [ ] (*m*).

The [ ] day of [ ], A. D. [ ].

Witness, X. Y.

O. P.

LIV.

Enlargement of time by the parties.

[*Enlargement indorsed on the submission,*]—We, the within-named A. B. and C. D., do hereby agree to give and allow to the within-named arbitrator a further time for making his award, namely, until the [ ] day of [ ], A. D. [ ]; and we further declare and agree that all the provisions of the within-contained "agreement of reference" [*or* "bond of submission," *or* "order of Nisi Prius,"] shall continue of full force and effect; except that the same shall be construed and read as if the day hereby given and allowed had been given and allowed for the making of the award by the "within-contained agreement of reference" [*or* "bond of submission, *or* "order of Nisi Prius."]

In witness whereof we have hereunto set "our hands" [*if the submission be by bond or deed, say,* "our hands and seals,"] this [ ] day of [ ], A. D. [ ] (*n*).

Witness, A. B.

O. P. C. D.

(*l*) See P. 2, ch. 4, s. 4, d. 4, p. 223, as to commencement of the umpire's authority.

(*m*) See P. 2, ch. 3, s. 2, d. 1, p. 136, as to enlargement by the arbitrator.

(*n*) See P. 2, ch. 3, s. 2, d. 2, p. 141, as to enlargement of time by the parties.

LV.

In the Queen's Bench,

Monday, the [ ] day of [ ], A. D. 1848, in the 11th year of the reign of Queen Victoria. Rule for enlargement by consent.

B. v. D. } Upon reading the rule made on [*date of rule embodying submission.*], and upon hearing Mr. [ ], of counsel for the plaintiff, and Mr. [ ], of counsel for the defendant, and by their consent; it is ordered that the time limited for the arbitrator making his award between the parties be enlarged until the [ ] day of [ ].

By the Court.

LVI.

Master of the Rolls.

Saturday, the [ ] day of [ ], in the eleventh year of the reign of her Majesty Queen Victoria, 1848. Order of Chancery for enlargement by consent.

Between { A. B. plaintiff, and C. D. defendant. } Upon motion this day made unto this court, by Mr. E. of counsel for the plaintiff; it was alleged, that by an order dated the [ ] day of [ ], it was, by consent, ordered, that all matters in difference should be referred to the arbitration, award, and final determination of X. Y., Esquire, barrister-at-law, who was to make his award on or before the [ ] day of [ ]; [*if the time has been enlarged before, insert the following clause,* " that by an order dated the [ ] day of [ ], it was ordered, that the time for the said arbitrator to make his award should be enlarged until the [ ] day of [ ];"] that the said arbitrator has not yet been able to make his award; and therefore it was prayed that the time for the said arbitrator to make his award may be [*if the order be for a second enlargement say* " further "] enlarged to the [ ] day of [ ].

Which is ordered accordingly; Mr. F. of counsel for the defendant consenting thereto.

LVII.

B. v. D. [*or* " In the matter of arbitration between A. B. and C. D."] Let the " plaintiff's " [*or* " defendant's"] attorney, or agent, attend me at my chambers, in Rolls Garden, at [ ] of the clock in the " forenoon," [*or* " afternoon,"] to show cause why* the time (*n*) limited for the Summons for enlargement by a judge under the statute.

(*n*) The expression in the statute is " to enlarge the *term*;" see p. 144.

arbitrator's making his award between the parties should not be enlarged until the [ ].

Dated the [ ] day of [ ], A. D. [ ] (o).

[*Judge's signature.*]

LVIII.

Judge's order for enlargement under the statute.

B. v. D. [*or* " In the matter of arbitration between A. B. and C. D."] Upon hearing the attornies or agents on both sides, and upon reading the affidavits of G. H. and I. K., I do order * that the time limited for the arbitrator making his award between the parties " in this cause " [*or* " in this matter "] be enlarged until [ ] next.

Dated the [ ] day of [ ].

[*Judge's signature.*]

LIX.

In the Queen's Bench.

[ ] the [ ] day of [ ], A. D. [ ], in the [ ] year of the reign of Queen Victoria.

Rule nisi for enlarging time under the statute.

A.B. v. C.D. [*or* " In the matter of arbitration between A. B. and C. D."] Upon reading the rule made in this " cause " [*or* " matter "] on [*date of rule embodying submission*], and the affidavits of G. H. and I. K. it is ordered, that " the defendant " [*or* " C. D. in the said rule and affidavits mentioned "] upon notice of this rule being given to him or his attorney, shall upon the [ ] day of [ ] show cause why * the time limited for the arbitrator making his award between the parties should not be enlarged until [ ]. Upon the motion of Mr. [ ].

By the Court.

LX.

In the Queen's Bench.

[ ] the [ ] day of [ ], A. D. [ ], in the [ ] year of the reign of Queen Victoria.

(o) See P. 2, ch. 3, s. 2, d. 3, p. 143, as to enlargement of time by the courts.

A. B. v. C. D. [*or* "In the matter of arbitration between A. B. and C. D.]

Upon reading the rule made in this "cause," [*or* "matter,"] on [*date of rule nisi*], the affidavits of G. H. and I. K., [*the affidavits in answer, if any,*] and upon hearing Mr. [ ] of counsel "for the plaintiff," [*or* "for A. B. in the said rule mentioned,"] and Mr. [ ] of counsel "for the defendant," [*or* "for C. D. in the said rule mentioned,"] it is ordered * that the time limited for the arbitrator making his award between the parties in this "cause" [*or* "matter"] be enlarged until [ ] next.

Rule absolute for enlarging time under the statute.

By the Court.

LXI.

[*Commence the summons as in Form LVII. as far as the asterisk, and continue*]—"the plaintiff" [*or* "the said A. B."] should not be at liberty to revoke and make void the power and authority of the arbitrator to make his award in the reference herein. [*Conclude as in the Form LVII.*] (*p*).

Summons for leave to revoke.

LXII.

[*Commence the order as in Form LVIII., as far as the asterisk, and continue*]—that "the plaintiff" [*or* "the said A. B."] be at liberty to revoke and make void the power and authority of the arbitrator to make his award in the reference herein. [*Conclude as in Form LVIII.*]

Judge's order for leave to revoke.

LXIII.

[*Commence the rule as in Form LIX., as far as the asterisk, and continue as in Form LXI., concluding as in Form LIX*].

Rule nisi for leave to revoke.

LXIV.

[*Commence the rule as in Form LX., as far as the asterisk, and continue as in Form LXII., concluding as in Form LX.*]

Rule absolute for leave to revoke.

(*p*) See P. 2, ch. 3, s. 3, d. 2, p. 151, as to revocation by leave of court.

LXV.

Revocation of submission by a party.

Know all men by these presents, that I, A. B. of [ ], have revoked, annulled, and made void, and by these presents do revoke, annul, and make void all the power and authority which by [*recite the submission, for instance,*] a certain agreement of reference in writing, made the [ ] day of [ ], A. D. [ ] between me the said A. B. and C. D. of [ ], were conferred upon X. Y. of [ ], the arbitrator thereby appointed to award and determine on certain matters in difference between me and the said C. D.; and I do hereby discharge and prohibit the said X. Y. from making any award, or from any further proceeding in the said arbitration.

As witness my "hand," [*if the submission be by bond or deed say*] "hand and seal," this [ ] day of [ ], A. D. [ ] (*q*).

Witness, A. B, [*if by deed, L. S.*]
O. P.

LXVI.

Notice of revocation to arbitrator.

Sir,

I hereby give you notice that by a writing under my hand and seal, made on the [ ] day of [ ], A. D. [ ], I have revoked, annulled, and made void your authority as arbitrator; and I hereby discharge and prohibit you from further proceeding in the matters of the arbitration between me and C. D.

Dated the [ ] day of [ ], A. D. [ ].

To X. Y., Esq. A. B.

LXVII.

Notice to parties of award made.

Gentlemen,

I hereby give you notice that I have made and published my award in writing respecting the matters in difference between Mr. A. B. and Mr. C. D. referred to me, and that it lies at "my chambers," [*or other place specified,*] ready to be delivered.

The charges amount to £ [ ] (*r*).

Yours truly,

X. Y.

The [ ] day of [ ], A. D. [ ].

To Mr. A. B. and Mr. G. H., attorney for Mr. A. B., and to Mr. C. D. and Mr. I. K., attorney for Mr. C. D.

(*q*) See P. 2, ch. 3, s. 3, d. 1, p. 147, as to revocation by a party.

(*r*) See P. 2, ch. 5, s. 1, dd. 2, 3, pp. 239, 240, as to publishing and delivering the award. Also P. 3, ch. 9, s. 2, d. 1, p. 617, as to effect of notice on the parties.

AWARDS.

LXVIII.

Award on a reference by order of Nisi Prius on the usual terms.

[*See order of Nisi Prius on the usual terms, Form XIII.*]—(*a*) Whereas at the assizes held at Kingston upon Thames, in and for the county of Surrey, on Monday, the 23rd day of March, A. D. 1846, before the Right Honorable Thomas Lord Denman, Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen herself; the Honorable Edward Hall Alderson, Knight, one of the Barons of our said Lady the Queen, of her Court of Exchequer; and others their fellows, Justices of our said Lady the Queen, appointed to take the assizes for the said county of Surrey, according to the form of the statute in that case made and provided: on the trial of a cause in which A. B. was plaintiff, and C. D. defendant; it was ordered by the court, with the consent of the parties, their counsel, and attornies; that a verdict should be entered for the plaintiff, damages the amount in the declaration in the above cause mentioned, cost 40s.; but that such verdict should be subject to the award, order, arbitrament, final end, and determination of me, X. Y., Esq., barrister-at-law; who was by the same order empowered to direct, that a verdict should be entered for the plaintiff or for the defendant, as I should think proper; and to whom the above-mentioned cause, and all matters in difference between the parties, were thereby referred; to order and determine what I should think fit to be done by either of the said parties respecting the matters in dispute; so as that I the said arbitrator should make and publish my award in writing respecting the matters referred, ready to be delivered to the said parties, or to either of them; or if they, or either of them should be dead before the making of the award, to their respective personal representatives who should require the same; on or before the fourth day of the then next Easter term, or on or before any other day, to which I the said arbitrator should, by any writing under my hand, to be indorsed on the said order, from time to time enlarge the time for making my award.

Recital of part of order of Nisi Prius.

Of power to the arbitrator over the verdict.

Of cause and all matters referred.

Of manner in which award to be made.

Of power to the arbitrator to enlarge the time.

And whereas it was also ordered that the costs of the said cause, to be taxed, should abide the event of the said award; and that the costs of the reference and of my award, to be taxed, should be in the discretion

Of power to the arbitrator over costs.

(*a*) See P. 2, ch. 5, s. 2, p. 244, as to the form of the award.

of me the said arbitrator, who might direct and award to and by whom, and in what manner, the same should be paid.

Of enlargement of time by the arbitrator.

And whereas I the said arbitrator, on the 2nd day of April, A. D. 1846, did, by writing under my hand, indorsed on the said order, enlarge the time for making my award until the fourth day of Michaelmas Term then next.

Of further enlargement of time.

And whereas I the said arbitrator, on the 7th day of July, A. D. 1846, did, by writing under my hand, indorsed on the said order, further enlarge the time for making my award until the fourth day of Michaelmas Term, A. D. 1847.

Award of and concerning the premises.

Now I the said arbitrator having taken upon myself the burthen of this reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, and documents which have been given in evidence before me; do hereby make and publish my award in writing of and concerning the matters above referred to me (*b*), in manner following, that is to say:—

On issue on non assumpsit.

As to the issue firstly joined in the said cause (*c*), I award and adjudge, that the defendant did promise in manner and form, as the plaintiff has in the declaration in the said cause complained against him.

On issue on traverse to plea of payment.

And as to the issue secondly joined in the said cause, I award and adjudge, that the defendant did not pay to the plaintiff, nor did the plaintiff accept of and from the defendant the sums in the last plea of the defendant in the said cause mentioned, or any part of them, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned, in manner and form, as the defendant has in his last plea alleged.

Award of damages in the cause.

And I further award and adjudge, that the plaintiff has sustained damages, by reason of the non-performance by the defendant of the promises in the declaration mentioned, to the amount of [ ] [*it is better to state the sum in words than in figures*] pounds, which sum I award and direct the defendant to pay to the plaintiff (*d*).

Direction to pay.

Verdict to stand, but for reduced damages.

And I further award and direct that the verdict which has been entered for the plaintiff do stand; but that the entry of damages be reduced to the sum of £ [ ] above mentioned (*e*).

Award as to other matters in difference.

And I further award and adjudge that there are no matters in difference between the parties other than those in the said cause. [*or* " And as to the matters in difference between the parties other than those in the said cause, I award, adjudge, and direct, that the defendant do pay to the plaintiff the sum of [ ] pounds, in full satisfaction and

(*b*) See P. 2, ch, 5, s, 4, dd. 1, 4, 5, 6, pp. 250, 260, as to awarding of and concerning the premises.

(*c*) See P. 2, ch. 6, s. 2, d. 4, p. 343, as to awarding on the issues.

(*d*) See P. 2, ch. 6, s. 4, p. 355, as to awarding damages.

(*e*) See P. 2, ch. 6, s. 3, p. 350, as to awarding a verdict.

discharge of all claims and demands by the plaintiff against the defendant in respect of the same (*f*).

And I further award and adjudge that the defendant has no claim or demand against the plaintiff in respect of any matters in difference between them (*g*).

Award defendant to pay plaintiff's costs of reference and award.

And I further award and direct that the defendant do pay to the plaintiff his costs of and incidental to the reference and award, and that the defendant do bear his own costs of the same (*h*).

In witness whereof I have hereunto set my hand this 5th day of April, A. D. 1847.

Signed and published the 5th day of April, 1847, in the presence of O. P. X. Y.

CLAUSES IN AWARDS (*i*).

Commencement of award reciting submission by agreement or deed.

1. Whereas by a certain "agreement in writing," [*or* "indenture," bearing date the [ ] day of [ ], A. D. [ ], made between A. B., of [ ], ["of the first part,"] and C. D., of [ ], ["of the second part,"] reciting that [*here recite so much of the matters in difference as will explain and justify the subsequent directions of the award*] it was agreed that "the same" [*or* "that all matters in difference," *state the terms of reference as the case may be*] should be referred to the award and final determination of me, X. Y., of [ ]. And whereas it was further agreed that [*here set forth such of the several powers and provisions in the submission as warrant the following directions of the award*]. Now I the said arbitrator, &c.

Commencement of award reciting a submission by bond.

2. To all to whom these presents shall come, we, U. V. of [ ], and X. Y., of [ ], send greeting.

Whereas A. B., of [ ], did by his bond, bearing date this [ ] day of [ ], A. D. [ ], become bound to C. D., of [ ], in the penal sum of £ [ ]; and the said C. D., by his bond, also bearing date the day and year aforesaid, became bound to the said A. B. in the like penal sum of £ [ ]. * Which bonds respectively recite that [*here set out so much of the recital in the bonds as*

(*f*) See P. 2, ch. 5, s. 4, d. 2, p. 256, as to awarding a gross sum.

(*g*) See P. 2, ch. 5, s. 4, d. 7, p. 265, as to negativing groundless claim.

(*h*) See P. 2, ch. 7, s. 1, p. 370, as to awarding costs.

(*i*) In the following clauses, appended to the Form LXVIII., an endeavour has been made to collect under one head a variety of forms of the parts of awards most wanted in ordinary practice; of modes of adjudicating on matters which most frequently arise for decision; and of directions often necessarily or beneficially inserted in an award. An arbitrator, selecting from these clauses, such as suit the subject of reference before him, and are within the powers conferred on him by the submission, will find, it is hoped, little difficulty in adapting Form LXVIII., or some of the other forms of awards, to his own particular purpose.

suffices to show what is referred, and to explain the rest of the award]. Under which bonds conditions were respectively written for making the same void, if the said A. B. and C. D. respectively, and their respective heirs, executors, and administrators, should observe, perform, and keep the award, which we the said arbitrators should make "of and concerning the said matters referred," [*according to the bonds*]; so as we, the said arbitrators, should make and publish our award in writing, &c. &c. [*as in Form VII., altering the person and tense, as far as the commencement of the provision respecting the umpire*]. Now we the said arbitrators, &c.

Commencement of award on submission by bond.

3. [*Award, on submission by bond as in Form VIII. Commence as in the preceding clause, as far as the asterisk.*]—Under which bonds conditions were respectively written, that the said A. B., and C. D. respectively, and their respective heirs, executors, and administrators, should in all things well and truly stand to, obey, abide by [*continue as in Form VIII., to the end of the recital of the matters referred,*]; so as I the said arbitrator should make and publish my award [*here follow the provisions of the bonds, as to the delivery of the award, the time for making it, and the power of enlargement, changing the person and tense*]. Now I the said arbitrator, &c.

Commencement of award on a submission by deeds poll.

4. Whereas by a certain deed poll, made and executed by A. B., of [ ], on the [ ] day of [ ], A. D. [ ], and by a certain other deed poll, made and executed by C. D. of [ ], on the day and year last aforesaid, after reciting that [*here recite such portions of the recital in the deeds poll as are material to explain the award*] it was agreed that [*matters referred*] should be referred to the award of me, X. Y. of [ ], &c. &c.

Commencement of award on a submission by a judge's order.

5. Whereas by an order of reference made by the Honorable Sir Thomas Coltman, Knight, one of the judges of her Majesty's Court of Common Pleas, all matters in difference in a certain cause then pending in the said court, between A. B. plaintiff, and C. D. defendant, were referred to me, X. Y., Esq., barrister-at-law, in manner and form as by the said order, reference being thereto had, will more fully and at large appear.

Commencement of award reciting an order of Nisi Prius made at the

6. Whereas by an order made at the sittings of Nisi Prius, held "at Westminster, in and for the county of Middlesex," [*or* "at the Guildhall, in and for the city of London,"] on the [ ] day of [ ], A. D. [ ], before the Right Honorable Thomas Lord Denman, Chief Justice of our Lady the Queen, assigned to hold pleas before the Queen

herself, [*or before any other judge as in the order of reference,*]; in a certain cause, &c. — sittings in London or Westminster.

7. [*For the form of recital of an order of Nisi Prius made at the assizes, see the commencement of Form LXVIII.*] — Commencement of award on a reference at the assizes.

8. [*For the form of recital of an order of Nisi Prius referring an indictment, see the commencement of Form LXX.*] — Commencement of an award on a reference of an indictment.

9. Whereas by a rule of the Court of Queen's Bench, made the [ ] day of [ ], A. D. [ ], in a cause wherein A. B. was plaintiff, and C. D. defendant, it was, by consent, ordered, that all matters in dispute between the said parties should be referred to the award of me, X. Y., of [ ]. — Commencement of award on submission by rule of court.

10. Whereas by a certain order made by the Lord High Chancellor [*or as the case may be*], on the [ ] day of [ ], A. D. [ ], in a certain cause then depending in the High Court of Chancery, wherein A. B. was the plaintiff and C. D. and E. F. the defendants, it was by the consent of the said parties and their counsel ordered, that [*state the terms of reference*]. — Commencement of an award on a submission by order of Chancery.

11. [*Recite the submission, as to the appointment of the arbitrators, and the provision for appointing an umpire, and such other parts as may be necessary, and proceed*].—And whereas the said U. V. and X. Y. did by a writing under their hands, bearing date the [ ] day of [ ], indorsed on the said order of reference [*or as the case may be*], appoint me, A. Z., of [ ], to be the umpire, pursuant to the said order. "And whereas the said U. V. and X. Y. did not make any award of and concerning the premises before the [ ] day of [ ]," [*the limit of the arbitrators' authority*]. [*Where there is no limit, say instead* "And whereas the said U. V. and X. Y. have not made any award concerning the matters referred, but have finally and altogether disagreed respecting the same."] Now I, said A. Z., having taken upon myself the charge of this reference, and having heard, examined, and considered the allegations, witnesses, and evidence of both the said parties concerning the premises; do make this my umpirage in writing of and concerning the premises, in the manner following: that is to say:—I award and adjudge, &c. &c.

Recital in award by umpire.

Appointment of umpire.

Arbitrators not made award.

Preamble to the awarding part of the award.

12. [*For the forms of words in which, after making the necessary recitals, the arbitrator may introduce his decision and adjudication on the several matters, see Forms LXVIII.—LXXV.*]

Award, plaintiff good cause of action on two counts, no cause of action on third count.

13. [*Form of adjudication on a cause referred before issue joined*].—I award that the plaintiff has good causes of action against the defendant on the first and second count in the declaration for the sum of £ [ ]; which sum I direct the defendant to pay to the plaintiff: and I further award that the plaintiff has no cause of action against the defendant on the third count in the declaration (*k*).

Award defendant to pay a sum in full of all demands in the cause.

14. [*Cause referred before plea, the following is a sufficient determination*].—I award that the defendant shall pay to the plaintiff £ [ ] in full of all demands in the above-mentioned cause.

Award on the several issues in the cause.

15. And as to the issues firstly, secondly, and fourthly joined in this cause, I award and find for the plaintiff; and as to the issues thirdly and fifthly joined in the cause, I award and find for the defendant.

Award on non assumpsit.

16. As to the issue firstly joined in this cause, I award and find, that the defendant "did" [*or* "did not"] promise in manner and form as the plaintiff has in the declaration complained against him; [*if award for the plaintiff proceed thus*] and I assess the damages of the plaintiff by reason of the defendant's not performing his promises in the declaration alleged at £ [ ], which sum I direct the defendant to pay to the plaintiff.

Award on non assumpsit on the indebitatus counts, part for plaintiff, part for defendant.

17. As to the issue joined on the plea of non-assumpsit, I award and adjudge, that as to so much of the declaration in this cause, as relates to goods sold and delivered by the plaintiffs to the defendant, and to money paid by the plaintiffs to the defendant for the use of the defendant, the defendant did promise in manner and form, as the plaintiffs have alleged; and as to the residue of the declaration, that the defendant did not promise as the plaintiffs have alleged (*l*): and I assess the plaintiff's damages at the sum of £ [ ], which I direct the defendant to pay.

Award on tender as to

18. *Plea, except as* £50 *non-assumpsit; as to* £50 *tender*].—As to the

(*k*) See P. 2, ch. 6, s. 2, d. 3, p. 342, as to awarding on the cause before issue joined.

(*l*) See P. 2, ch. 6, s. 2, d. 4, p. 343, as to awarding on the issues.

issue firstly joined in this cause, I award and find, that the defendant "did" *or* "did not"] promise to a larger amount than the sum of £50 [*if for the plaintiff, proceed thus*], "and I assess the plaintiff's damages by reason of the defendant's not performing his promises alleged in the declaration at the sum of £ [ ], over and above the said sum of £50," which sum of £ [ ] I direct the defendant to pay to the plaintiff. And as to the issue secondly joined in this cause, I award and find, that the defendant "did" [*or* "did not"] tender and offer to pay to the plaintiff the sum of £50, as the defendant in his second plea has alleged. Award on part, on non assumpsit as to residue.

19. As to the issue joined in this cause, I award and find, "that the defendant was indebted to the plaintiff in the sum of £ [ ], "the debt in the declaration alleged" [*or* "parcel of the debt in the declaration alleged; and that the defendant never was indebted to the plaintiff in the residue of the debt mentioned in the declaration"]; and I direct the defendant to pay to the plaintiff the said sum of £ [ ];" [*or* "that the defendant never was indebted to the plaintiff in the sum in the declaration mentioned or in any part thereof"]. Award on nunquam indebitatus in debt.

20. [*Debt, plea, nunquam indebitatus, except as to* £50, *and payment into court of that amount*].—And as to the issue joined in this cause, I award and find, "that over and above the sum of £50 paid into court by the defendant, the defendant was indebted to the plaintiff in £ [ ], parcel of the debt in the declaration mentioned, in manner and form as in the declaration alleged; and that the defendant never was indebted to the plaintiff in the residue of the debt in the declaration mentioned, in manner and form as in the declaration alleged; and I direct the defendant to pay the plaintiff the said sum of £ [ ]; [*or* "that except as to the sum of £50 paid into court by the defendant, the defendant never was indebted to the plaintiff in the debt in the declaration alleged or in any part thereof"]. Award in debt when money paid into court.

21. I award and find that the "writing obligatory" [*or* "indenture," *or* "articles of agreement"] "is" [*or* "is not"] the deed of the defendant in manner and form as the plaintiff has alleged. [*If for the plaintiff in covenant proceed*] And I assess the damages of the plaintiff on occasion of the breaches of covenant alleged in the declaration at £ [ ], and direct the defendant to pay the same to the plaintiff. Award on plea non est factum. Damages in covenant.

22. [*In debt on indemnity bond, where a breach has been assigned in the pleadings*]. And I award and find, that the defendant did not indemnify and save harmless [*stating the breach as in the pleadings*], but wholly Award in debt on indemnity bond.

neglected and refused so to do, contrary to the tenor and effect of the bond declared on: and I assess the damages of the plaintiff by reason of the breach of the condition of the said bond assigned in the pleadings in this cause at £ [ ], and I direct the defendant to pay the same to the plaintiff.

Award in detinue.

23. I award and find that the defendant doth detain the "goods and chattels" [*or as the facts may be*] in the declaration mentioned, in manner and form as the plaintiff has alleged; and I award and find the "goods and chattels" [*or other things*] so detained to be of the value of £ [ ].

Award on plea not guilty in case, trover, and trespass.

24. I award and find that the defendant "is" [*or* "is not"] guilty of the [*in case and trover, say* "grievances"—*in trespass, say* "trespasses"] laid to his charge in the declaration [*if for the plaintiff, proceed*]; and I assess the damages of the plaintiff on the occasion thereof at £ [ ], which sum I direct the defendant to pay to the plaintiff.

Award on not guilty, de injuria, and new assignment in trespass.

25. I do award, order, and determine as to the first issue joined between the parties, that the defendant is not guilty of the trespasses in the declaration in the action laid to his charge, except as hereinafter mentioned; and as to the second issue, I do find for the defendant—that he did not of his own wrong, but for such cause as the defendant hath in his plea alleged, assault, beat, bruise, or ill-treat the said plaintiff, as he, the said plaintiff, has stated; and as to the last issue joined between the parties, I do award, determine, and find, that the defendant is guilty of the trespasses newly assigned; and I do assess the damages of the said plaintiff on account of the trespasses newly assigned, over and above his costs and charges, to one shilling (*m*).

Award of damages in a cause.

26. I find that the plaintiffs have sustained damages from the defendants, occasioned by the causes of action for which the said action was brought to the amount of [ ] pounds, [ ] shillings, and [ ] pence; and I assess the plaintiff's damages at the said sum of [ ] pounds, [ ] shillings, and [ ] pence, and award and direct the defendants to pay the same to the plaintiff.

[*This form, it is to be observed, does not decide on which counts the*

(*m*) See P. 2, ch. 6, s. 4, p. 356, as to awarding damages on new assignment.

plaintiff is entitled to recover. See special award as to damages, clause 67, Form LXVIII.] (*n*).

27. [*For the mode of awarding on matters not in the cause. See Form LXVIII.*] Award as to matters not in the cause.

28. [*Cause and all matters in difference referred, pleas in the action, non-assumpsit, and set-off*].—I award and adjudge, that the defendant did promise in manner and form as the plaintiff in his declaration in the said cause has complained against him. Award for defendant of balance of set-off.

And I assess the damages sustained by the plaintiff in respect of the causes of action alleged in the declaration at the sum of fifty pounds.

And I further award and adjudge, that the plaintiff was and is indebted to the defendant in manner and form, as the defendant has in his second plea in the said cause alleged.

And I further award and adjudge, that the plaintiff was and is indebted to the defendant in respect of the causes in the said plea alleged in the sum of eighty pounds.

And I further award and direct, that the sum of fifty pounds assessed for the plaintiff be allowed out of, and deducted from, the sum of eighty pounds found due to the defendant; and that the plaintiff pay to the defendant the sum of thirty pounds, the balance (*o*).

29. I award that the action shall cease, and be no further prosecuted(*p*). Award of a stet processus.

30. I award that the verdict entered for the plaintiff do stand, but that the damages be reduced to £ [ ] (*q*). [*When the arbitrator is empowered, and thinks fit to order speedy execution*].—And I further award and certify, that in my opinion, execution ought to issue in this action for the said damages [*or* for £ [ ], parcel of the said damages] "forthwith" [*or* "at any time not sooner than the [ ] day of [ ] next"]. Award of verdict for plaintiff with certificate for speedy execution.

31. I award that the verdict which has been entered for the plaintiff be set aside, and instead thereof "that a nonsuit be entered" (*r*), [*or* "that a verdict be entered for the defendant on all the issues"]. Award of nonsuit or verdict for defendant.

(*n*) See P. 2, ch. 6, s. 4, p. 355, as to damages.

(*o*) See P. 2, ch. 5, s. 4, d. 2, p. 257; P. 2, ch. 6, s. 4, p. 361, as to awarding balance to defendant.

(*p*) See P. 2. ch. 6, s. 1, p. 337, as to the sufficiency of an award of a stet processus.

(*q*) See P. 2, ch. 6, s. 3, p. 350, as to awarding a verdict.

(*r*) See P. 2, ch. 6, s. 1, p. 337, as to award of a nonsuit.

Award of verdict for defendant on some issues.

32. [*As in the above clause* 31, *as far as the word "thereof"*] — that verdict be entered for the plaintiff on the first issue, and for the defendants on the second and third issues.

Award on a demurrer.

33. I award and adjudge that the "first count in the declaration" [*or other pleading*] "is" [*or* "is not"] sufficient in law. [*If for the plaintiff, add*] "and that the plaintiff is entitled to recover from the defendant £ [ ] "damages on" [*or* "the debt mentioned in"] the said count.

Award of entry of judgment.

34. [*When arbitrator empowered to award that judgment be entered.*] —And I further award and direct that judgment be entered for the plaintiff [*or* "defendant"] in the said cause (*s*).

Award of judgment by default.

35. Whereas it was agreed [*or* "ordered"] that I should be at liberty to direct judgment by default to be entered against the defendants: —I award, order, and direct, that judgment by default be entered against the defendants in the said action.

Award that a suit in Chancery be dismissed.

36. As to the above-mentioned suit in Chancery, I award and adjudge, that the plaintiff has no title to the relief prayed by his bill; and I direct that the said suit be dismissed (*t*); [*or* "I award and direct that the plaintiff do apply to the Court of Chancery to have the said bill dismissed"].

Award as between parties, that bill be dismissed and injunction dissolved.

37. [*Bill by J. R., party to the reference, for an injunction against W. D., party to the reference, and others, not parties to the reference, to restrain the defendants from proceeding with an action.*] [*The suit having been referred with other matters, after injunction issued*].—And as to the said suit in Chancery, so far as regards the matters in difference between the said J. R. and the said W. D. therein, I find and award that the said injunction ought to be, and shall be, dissolved, and the said bill dismissed against the said W. D.. with costs, to be taxed by the proper officer, and paid by the said J. R.: and I direct that the said J. R. shall accordingly, without delay, cause and procure the said injunction to be dissolved, and his said bill to be dismissed with costs as aforesaid: and that if the said injunction be not dissolved, and the said bill dismissed with costs, so far as regards the said W. D., on or before the fourth day of Michaelmas Term next, then, that the said W. D. may move the said Court of Chancery for that purpose; and the said J. R. shall consent to, or not oppose, any motion or proceeding reasonably made or taken on that behalf.

(*s*) See P. 2, ch. 6, s. 5, p. 362, as to awarding entry of judgment.

(*t*) See P. 2. ch. 6, s. 6, p. 367, as to award on a suit in equity.

38. [*When only one demise, and arbitrator finds wholly for plaintiff*]. —I award that the defendant is guilty of the trespass and ejectment laid to his charge in this cause: and I assess the plaintiff's damages by reason thereof at one shilling. [*When arbitrator empowered to certify for immediate possession.*]—And I further award and certify, that in my opinion a writ of possession ought to issue in this action immediately. Award in ejectment with certificate for immediate possession.

39. I award that the verdict entered for the plaintiff be set aside; and that instead thereof, that a verdict be entered for the plaintiff on the issue joined on the first count, damages one shilling, costs forty shillings; and that a verdict be entered for the defendant on the issue joined on the second count. Award in ejectment on two demises.

40. [*Ejectment on two demises referred*].—I award and adjudge, that the plaintiff, on the demise of G. H., is entitled to the possession of a certain parcel of the lands sought to be recovered in this action; that is to say [*here set out the part by boundaries or full description*]; which said parcel is marked out and coloured red in the map annexed to this my award. And I award and assess the plaintiff's damages on the first count at one shilling. Award in ejectment specifying lands for each party.

And I further award and adjudge, that the plaintiff, on the demise of I. K., is entitled to the possession of a certain other parcel of the lands sought to be recovered in this action; that is to say [*here set out this other portion by boundaries or full description*]; which said last-mentioned parcel is marked out and coloured green in the above-mentioned map. And I award and assess the plaintiff's damages on the second count at one shilling.

And I further award and adjudge that the residue of the land sought to be recovered in this action consists of [*here set out the residue by boundaries or full description*]; which said residue is marked out and coloured yellow in the above-mentioned map. And I further award and adjudge that the plaintiff is not entitled to the possession of the said residue of the said lands; but that the defendant is entitled to the possession of the same.

And I direct that the map above referred to be taken and considered as part of this my award (*u*). Map to be part of award.

41. I award that the costs of the cause be paid by the defendant to the plaintiff (*x*). Award defendant to pay costs of cause.

(*u*) See P. 2, ch. 6, s. 3, d. 2, p. 353, as to awarding in ejectment.

(*x*) See P. 2, ch. 7, s. 1, p. 370, as to awarding costs.

Award each party to bear his own costs of cause.

42. I award that each party bear his own costs of the cause.

Award defendant to pay costs of reference and award.

43. I award and direct, that the defendant do pay to the plaintiff the costs incurred by the plaintiff of, and incidental to, the reference and award; [*when the arbitrator is to ascertain the amount, add the following words*] "and I assess the amount of the said costs of the plaintiff at £ [ ], and the costs of my award at £ [ ]".

Each to bear his own costs of reference and pay half costs of award.

44. And I further award and direct that the plaintiff and defendant do each bear his own costs of the reference, and pay one-half the costs of the award.

Each to pay half costs of reference and award.

45. I award and direct that one moiety of the costs of the reference and award be borne and paid by A. B., and the other moiety by C. D.

Some defendants to pay the costs.

46. [*See Form LXXI.*]

Award each party to pay proportion of costs.

47. [*Arbitrator empowered to award as to the costs of various actions, and how they should be paid.*]—And I further award, that A. B. shall pay or cause to be paid five eighth parts, and that C. D. shall pay or cause to be paid three eighth parts of all costs incurred, either in prosecuting the action brought by A. B. against G. H., or of defending the several actions wherein I. K. and L. M. were plaintiffs, and A. B,, M. N., and O. P., or any or either of them, were defendants. And I further award, that the sums already paid, laid out, and expended by A. B. and C. D. respectively, namely, the sum of £ [ ] by A. B., and the sum of £ [ ] by C. D., for, and towards, and on account of, the said suits, shall be considered and deemed as part payment of their respective shares, according to the proportions above mentioned; and I further award that all expenses attending this arbitration and this my award shall be paid and satisfied by A. B. and C. D. in equal shares and proportions.

Allowing sums already paid in account.

Award all costs to be added together, each to pay a proportion.

48. [*See the clause as to costs in Form LXXII.*]

Award of

49. [*Reference of informations and suits in Chancery respecting the affairs*

of some dissenting chapels; costs of suits and reference in the arbitrator's discretion].(*x*)—And as to the costs of the said suit, and of this reference and relating thereto, I do award and order, that so much of such costs as have been incurred by the said relators and plaintiffs, and by the said defendants, respectively, in and about establishing the said chapels, and the scheme, rules, and regulations for the maintenance and conduct of the affairs of the same, as between solicitor and client, shall be paid and reimbursed to them respectively out of the funds and monies of the said chapels; and in case there shall not be sufficient funds or monies of the said chapels immediately applicable to the payment of such costs, I do order, that the amount thereof, when ascertained, shall be a charge upon the said chapels, and the property thereof, to be paid to the parties respectively, to whom the same shall be due, with interest in the meantime half-yearly, at the rate of £4 per cent. per annum; and as to so much of the costs of the said suits, and of this reference, and relating thereto, as have been incurred by the said defendant, A. B., by reason of the attempt made by the relators and plaintiffs to remove him from the office of manager of the said chapels, I do award and order, that the same be paid to the said A. B. by the said relators and plaintiffs. And as to all other costs of the said suits, and of this reference, and relating thereto, including the costs of the supplementary information (which I determine to have been properly filed and properly framed), and other charges and expenses in the premises, the payment of which is not hereinbefore ordered and provided for, I do award and order, that the same be borne by the parties respectively by whom the same have been incurred. And I do order that the costs, the payment of which is hereinbefore ordered, shall be taxed by one of the Masters of the High Court of Chancery.

costs in equity.

Costs of both parties as to regulating the chapels to be paid out of the funds of the chapels.

Costs of one defendant to be paid by plaintiffs.

Other costs to be paid by the parties incurring them.

Costs to be taxed by a Master in Chancery.

50. And I do certify that this cause was proper to be tried before a judge of the superior courts, and not before the sheriff or judge of an inferior court (*y*).

Certificate cause proper to be tried before a judge.

51. I further award and certify that the cause was proper to be tried before a special jury.

Certificate for special jury.

52. And I award and certify that the action was brought to try a right other than the mere right to recover damages.

Certificate action brought to try a right.

53. And I further award and adjudge, that the said A. B. and C. D. shall

Award of mutual releases.

(*x*) See Form XXIII. for the submission in this case.

(*y*) See P. 2, ch. 7, s. 3, p. 388, as to certifying for costs.

each, on the requisition of the other of them [*sometimes it may be as well to insert,* " such other having first performed the award"], and at the costs and charges of the party requiring the same, sign, seal, and as his respective act and deed, deliver unto the other of them " mutual releases of all claims and demands in respect of the matters in difference referred" [*or more generally,* " mutual general releases in writing of all and all manner of actions and suits, causes of action and suit, bills, bonds, covenants, debts, rent, specialties, controversies, trespasses, claims, and demands whatsoever, from the beginning of the world until the time of the making of the aforesaid order of reference"], [*or* " arbitration bonds," &c., *as the case may be* (*z*).] [*It may sometimes be advisable to add,* " excepting anything by the award provided to be done or suffered"].

Award sums, &c., awarded to be in full satisfaction.

54. And I award, order, and determine, that the said damages and the said several sums of money awarded to be paid, and the several matters and things awarded and directed to be done by, or with regard to, the parties to this reference respectively as aforesaid, shall respectively be paid, received, done, accepted, and taken, as and for full satisfaction and discharge, and as a final end and determination " of the several matters aforesaid, and in difference between the parties referred to me" [*or* " of all matters in difference between the parties up to the time of the submission to arbitration"].

Award against executor.

56. [*Submission to arbitration between A. B., and C. D. executor of E. F.*]—I award and adjudge, that the said E. F., deceased, at the time of his death was indebted to the said A. B. in the sum of £100, and that the said C. D., the executor of the said E. F., at the date of this submission to arbitration, had in his hands goods and chattels which were of the said E. F. to be administered of the value of £80: and I direct the said C. D. to pay to the said A. B. the sum of £80 in part satisfaction of the said sum of £100 found due to the said A. B. (*a*).

Award on partnership accounts.

55. [*Reference by A., B., and C., partners, disputes having arisen respecting the accounts, and as to the amount to be paid to A., the retiring partner, as his share, B. and C. still carrying on the business*].

Award on amount of debts due to the firm.

I award and adjudge as between the parties to this reference, that the amount of debts due to the said firm is £10,000, which sum is made up " in the following manner," viz.

(*z*) See P. 2, ch. 5, s. 4, d. 3, p. 260; P. 2, ch. 8, r. 8, d. 6, p. 410, as to effect of an award of mutual releases.

(*a*) See P. 1, ch. 2, s. 2, d. 4, p. 36; P. 2, ch. 8, s. 1, d. 2, p. 401, as to awarding against executors.

of £ [ ], due from G. H, of [ ].
of £ [ ], due from I. K. of [ ].
ditto ditto.

[*or if the amounts are set out in the schedule, say* " of the particular items set forth in the schedule of debts due to the firm, appended to this award"].

Value of partnership property.

And I further award and adjudge, that the value of the effects, stock in trade, money, securities, and property of the said firm of every kind and sort other than the said debts is £20,000.

Amount of debts due to creditors of the firm.

And I further award and adjudge as between the said partners, that the amount of debts due from the said firm to others than the said partners is £5,000, which last-mentioned sum is made up in the following manner, that is to say—

Of £ [ ] due to L. M. of [ ],
Of £ [ ] due to O. P. of [ ],

[*or say,* " is made up of the particular items set forth in the schedule of debts due from the said firm, appended to this award"].

Amount of capital of each partner.

And I further award and adjudge, that there is due from the said firm, for capital and interest on the same to the date of the reference; to A. the sum of £8,000; to B. the sum of £6,000; to C. the sum of £5,000.

Deduction to be made for bad and doubtful debts.

And I further find, that in estimating the amount to be divided as profits, it is reasonable to deduct from the said sum of £10,000, the amount of debts due to the firm, the sum of £1,000 for bad and doubtful debts; and I award that the same be deducted.

Balance remaining.

And I further award and find, that on a balance of the above-mentioned sums, there remains the sum of £5,000 in favor of the firm.

Deduction for trouble and expense.

And as it has been agreed between the said partners that B. and C., who intend to carry on the said business in partnership, shall be at the sole trouble and expense of collecting in the money due to the firm, and paying the creditors of the same; I award and adjudge, that the sum of £500 be deducted from the last-mentioned sum of £5000, and be retained by them in equal moieties, as a compensation for such trouble and expense.

Amount to be divided as profits.

I therefore further award, that the sum of £4,500 remains to be divided as profits.

Share of profits of each.

And I further award and adjudge, that A. is entitled to one-half of the profits of the said firm, and B. and C. each to one quarter of the said profits.

Amount on the whole due to each.

And I further award and adjudge, that, adding the share of the profits to the amount of the capital of each, there is, on the whole, due to A. the sum of £10,250; to B. the sum of £7,375; and to C. the sum of £6,375.

Direction to pay retiring partner his share.

And I further award and direct, that B. and C. shall pay to A. one moiety of the said sum of £10,250 on or before the [ ] day of [ ] next, and the remaining moiety of the said sum within one year from the last-mentioned day.

Variation in value not to affect retiring partner.

And I further award, that A. shall receive the said sum of £10,250 in full satisfaction of all his claims and interest in the said firm, or in anywise relating thereto, and shall not be entitled to any increase, or liable to any deduction, in case the amounts of the debts or credits of the said firm hereafter prove to be different from the sums at which they are estimated in this my award, but that the benefit or burthen of such difference be borne wholly by B. and C. in equal proportions (*b*).

Award of dissolution of partnership.

57. [*Reference to settle terms of dissolution of partnership between A. B. and C. D.*]—I do make this my award of and concerning the matters so referred to me as aforesaid, in the manner following, that is to say:—First, I do award, order, and adjudge, that the said partnership shall be deemed and taken to have ended and been determined on and from the [ ] day of [ ].

A. B. to receive to his own use debts due to the firm.

Secondly, I do award, order, and direct, that the said A. B., his executors or administrators, shall and may have, demand, and receive, to his, her, or their own use, without interference of the said C. D., all debts due and owing to the said partnership from any person whomsoever.

A. B. may use C. D.'s name in action or suit.

And shall and may use the name of the said C. D., either alone or jointly, in any action or suit to be commenced for the recovery of any such debt or demand (*c*).

A. B. to pay all debts due from the firm.

Thirdly, I do award, order, and direct, that the said A. B., his executors or administrators, shall and do bear, pay, and discharge all debts, demands, damages, and claims whatsoever, due or owing by the said partnership, or which any person hath or can make against the said copartnership, or the said C. D. in respect thereof.

To indemnify C. D. against debts, and costs of using his name.

And shall and do indemnify and keep harmless the said C. D. from and against all such debts, demands, damages, and claims; and from and against any loss and damages that may be incurred or sustained by the said C. D. by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said A. B., his executors and administrators; and that the said A. B. shall seal, execute, and deliver his bond to the said C. D., in the penal sum of £ [ ], conditioned to indemnify and keep harmless the said C. D. from and against the above-mentioned debts, demands, damages, claims, and loss (*d*).

A. B. to execute bond of indemnity.

Fourthly, I do award, order, and direct, that the said C. D. shall and do, at any time or times, upon the request of the said A. B., his executors or administrators, deliver up to the said A. B., his executors or adminis-

(*b*) See P. 2, ch. 8, s. 1, d. 4, p. 404, as to awarding on partnership matters.

(*c*) See P. 2, ch. 8, s. 1, d. 4, p. 407, as to awarding right to sue in partner's name.

(*d*) See P. 2, ch. 8, s. 1, d. 5, p. 408, as to awarding indemnity to be given.

trators, all and every the books, papers, and writings, which may be in the custody, power, or possession, of him the said C. D. in any wise relating to, or concerning the said business of the said co-partnership. C. D. to deliver up all books of the firm.

Fifthly, I do award, order, and direct, that the said A. B. shall and do on the [ ] day of [ ], next, at the house of the said C. D. as aforesaid, pay unto the said C. D., his executors or administrators, the sum of £ [ ]: and that the said C. D. shall and do accept and receive the same sum, in full satisfaction and discharge of all demands against the said A. B., until the day of the date of the said submission. A. B. to pay C. D. sum of money in full of all demands.

58. [*On a submission between A.B., and C.D., partners, when the amount owing to the firm is unascertained, the following provision may be made,*]—and whereas it cannot be ascertained what sums of money are due and owing to the said firm, I further award and direct, that the said A. B. shall use his utmost endeavors to ascertain, collect, and receive the debts due to the said firm as aforesaid, and that the said C. D. shall permit and suffer the said A. B. to collect and receive the same. [*A clause may be added, empowering A. B. to use C. D.'s name to recover the debts, on an indemnity being given, as in clause 57; and then proceed.*] Award between partners. One to collect debts due to the firm.

And I further award and direct, that the said A. B. shall, from time to time, give to the said C. D. an account in writing of his proceedings in the ascertainment and recovery of the said debts, within six weeks after a request in writing so to do shall have been served upon the said A. B. on the part of the said C. D.; and shall also from time to time, as the said debts shall be respectively received, pay to the said C. D. one moiety thereof, after having first deducted all necessary expenses incurred touching the ascertaining, collecting, and recovering the same. And pay to the other a moiety of each debt as received.

59. I award and direct the said C. D., at the cost and charges of the said A. B., to execute to the said A. B., his executors and administrators, a good and valid assignment of all that [*here describe the leasehold premises to be assigned*]; and I further award and direct the said C. D., at the like cost and charges of the said A. B., to execute to the said A. B., his heirs, executors, administrators, and assigns, a release of all the right, title, and interest of him, the said C. D., or his heirs, executors, or administrators, unto and in [*here describe the premises*]. Award of assignment and release.

60. And I further award and direct, that the said C. D. shall, within one calendar month from the date of this award, deliver into the hands of A. B., or his heirs, all deeds, and other writings, in the custody, possession, or control of the said C. D., relating to, or in any way affecting the Award to deliver up deeds.

said freehold house, with the appurtenances, known by the name of [ ].

Award of conveyance of freehold in fee simple.

Costs of preparing deeds.

61. And I further award and direct, that the said C. D. shall, within one calendar month from the date hereof, convey, by a good and sufficient conveyance, by lease and release, the freehold house, with the appurtenances, known by the name of [ ], [*or describe the premises particularly as in the intended conveyance*], unto the said A. B., his heir or heirs, in fee simple; and that the said A. B. shall, at his own costs, prepare and tender for execution, by the said C. D., the said lease and release (*e*).

Award to remove hatches as far as defendant can.

62. [*Arbitrator, empowered to direct what shall be done, being desirous to have as many hatches as possible removed from a river, but it being doubtful whether third parties are not interested in some of them.*]—And I further award and direct, that the defendant shall remove from the said river the said hatches at [ ], in the said river, and the said hatches at [ ], lower down in the said river, provided always that these directions shall refer only to such interest as the defendant shall have in the said hatches (*f*).

Award to prostrate an embankment.

63. [*See the direction to prostrate an embankment, Form LXX.*]

Award of bridge to be erected on stranger's land, provided he consent.

64. [*Reference between A. B. and C. D. Arbitrator empowered to order what he shall think fit to be done.*]—I further award and direct, that for the future convenience of the said A. B. and others, having occasion to pass along the said road, the said C. D. shall, at his own expense, put up and fix a good and sufficient foot bridge across the said stream, at the spot where the said road crosses the said stream, provided that E. F. of [ ], the owner of the land where the said bridge is so directed to be put up, give his consent thereto.

Award adjusting right to tithes when impossible to ascertain boundaries.

65. [*Submission between P., rector of A., and H., rector of B,, and other parties, to an arbitrator, "to whom it is referred to ascertain what lands are severally titheable to the rectors of parishes A. and B., and what description of tithe is due to each in respect of the farm lately occupied by C.; to devise all means to prevent future litigation between the parties to*

(*e*) See P. 2, ch. 8, s. 1, d. 7, p. 411, as to awarding conveyances.

(*f*) See P. 2, ch. 8, s. 4, d. 3, p. 431, as to awarding concerning a stranger's property.

this order, or between any or either of them during the joint incumbencies of P. as rector of A., and H. as rector of B.; and generally to settle all matters in difference between the parties to this order, or any or either of them; and to order and determine what he shall think fit to be done respecting the matters in dispute by the parties, or either of them, who agree to be bound by such determination, and to remain contented and satisfied therewith."]—Whereas it has become impossible, touching the matters referred, to ascertain and distinguish the particular parcels of land to the tithes of which the rectors of A. and B. are respectively entitled; I award that one fourth part of all the great and small tithes growing due from the farm lately occupied by C., are the right and property of H., rector of B., and that the remaining three-fourth parts of such tithes are the right and property of P., rector of A. And I further award that one fourth part of all the great and small tithes growing due from such part of the west side of A., as formerly lay in tenantry, or was sheep-down, adjoining to, though not being part of the farm lately occupied by C., is likewise the right and property of H., rector of B.; and that the remaining three-fourth parts of such last-mentioned tithes are the right and property of P., rector of A. (*g*).

Rectors to have proportionate shares of the whole tithes.

66. Whereas by an agreement of reference made the [ ] day of [ ], between B. of [ ], and D. of [ ]; which recited that B. was the owner and occupier of a messuage and lands situate [ ], and D. the owner and occupier of a messuage adjoining B.'s; that there was between the two houses a yard or passage, in which were a pump, brewhouse, and oven, and below, or at the end of which yard, was a crooked hedge and ditch, separating the lands of D. from the yard or passage; that D. had erected a wall on what was alleged by B. to be part of the passage or yard; that B. had fastened up the pump with a chain, which D. had broken, after receiving notice not to do so, nor to go to the pump; that there was an entrance into the yard by means of a stile, and also by means of a doorway, which D. had closed up; that B. alleged himself to be possessed of, or entitled to, the passage, yard, pump, brewhouse, and oven, and the land on which the wall was erected, as his sole, entire, and exclusive property, and to have a right of free ingress and egress into and out of the yard at his pleasure, by means of the doorway in question; that B. charged D. with having at different times removed the hedge nearer to B.'s lands; and that he denied any right in D. to break the chain, to take water from the pump after notice, to remove the hedge, or to keep the doorway into the yard closed; and that B. had commenced an action of trespass against D: it was agreed by and between the parties to refer all matters in

Award how property to be used and repaired.

Recital of differences.

(*g*) See P. 2. ch. 8, s. 2, d. 2, p. 416, as to awarding undivided shares.

difference to the arbitration of me, X. Y. of [ ], Esq.; and that I, the said arbitrator, should have power in my award to state how, and by whom, and in what manner, the passage or yard, pump, doorway, hedge and ditch, should in future be enjoyed and occupied, and who should have the care and management thereof; and that if I should find any matter complained of had been illegally placed, erected, or continued, I should and might award when and how the same should be abated.

Now I, the said arbitrator, &c. [*The award, after deciding the cause in favor of B., may proceed as follows*].

Award to B. the property of the yard.

And I further award, that B. is possessed of and entitled to the said passage or yard, pump, brewhouse, and oven, as his sole, entire, and exclusive property, but not to the land on which the said wall is erected, the said land not being part of the said yard or passage.

Award to D. a right to use the pump.

And I further award, that D. has a right to the free use of water from the said pump, in common with B., and of ingress and egress into and out of the said yard, by and over the said stile, for the purpose of fetching such water therefrom.

Award to B. right of entry through the doorway.

And I also award and adjudge, that B. has a right of free ingress and egress into and out of the said yard or passage, at his free will and pleasure, by means of the said doorway, which I direct D. to unclose and leave open.

D. not removed the hedge.

D. right to break the chain.

And I also award and adjudge, that D. has not removed the said crooked hedge into or nearer to the lands of B. than it formerly was; and that he had a right to break the chain so placed around the said pump as aforesaid, and to take away water from the same.

B. and D. jointly to repair pump.

D. may use pump.

And in further exercise of the power, conferred upon me by the said submission, I hereby award and declare, that the said pump shall in future be repaired at the joint expense of B. and D.; and that D., his heirs and assigns, shall have free ingress and egress into and out of the said yard, by and over the said stile, for the purpose of fetching and carrying water therefrom.

Present boundary to remain.

Award of land and wall to D.

And I further award and direct, that the boundary between the premises occupied by B. and D. respectively, shall remain as it is at present; and that D. shall not be interrupted in the use of the said wall; but that the same, and the land whereon it stands, shall be considered as his absolute and exclusive property.

Enjoyment of yard to B., subject to D.'s right.

D., to repair hedge, may use the mud in the ditch.

And I further award, that, subject to the provisions herein contained, the said yard and passage shall be enjoyed by B. as his absolute and exclusive freehold property; and that the said hedge shall be kept in repair by D., who shall be at liberty to make use of the mud in the ditch adjoining for the purpose of repairing the said hedge-bank, but not further or otherwise; and subject to the exercise of such privilege, the said ditch shall be considered as the property of B., who shall be at liberty to carry away the mud therefrom, as he shall think proper (*h*).

(*h*) See P. 2, ch. 8, s. 2, dd. 2, 3, p. 417, as to awarding what to be done.

67. [*Case, that defendants wrongfully delayed pulling down their house, and wrongfully continued a hoarding obstructing footway to plaintiff's shop for an unreasonable time; that in pulling down their house negligently, bricks and tiles fell on plaintiff's house, breaking glass and damaging goods; and that defendants so carelessly underpinned and shored up the party-wall of plaintiff's house, that it sank and was damaged.*

Pleas, 1st, not guilty. 2nd, as to continuing the hoarding, custom of London for Lord Mayor to grant licence to erect a hoarding; licence from the Lord Mayor conditional on obtaining licence from the surveyor of pavements, and such surveyor's licence. Replication to this plea, de injuria (excepting the custom.) 3rd plea, as to breaking panes of glass, accord and satisfaction by mending windows.

Cause referred at Nisi Prius, verdict taken for the plaintiff with damages, subject to reference; power to arbitrator to direct nonsuit or verdict; arbitrator to state points of law on request.]

Award, arbitrator directed to raise points of law at the request of the parties for the opinion of the court.

As to the first issue joined between the said parties, I award and find, that the defendants, except as to the alleged careless, negligent, and improper conduct in shoring up the party-wall between the house of the defendants, in the declaration first mentioned, and the said house of the plaintiff, are guilty of the premises in the declaration in the said cause mentioned.

Award as to first issue, defendants guilty of part of trespass.

And I do assess the damages sustained by the plaintiff [*if questions are to be raised by the award as to the right of the plaintiff to recover damages in respect of particular grievances alleged in the declaration, assess the damages separately in respect of each, as thus*], by reason of the keeping and continuing of the hoarding so erected and placed as in the declaration is mentioned, and so obstructing the said footway and the approach to plaintiff's house, at the sum of £100, in respect of the space of time mentioned in the licence of [*the Lord Mayor*] in the second plea of the defendants mentioned, parcel of the time in the declaration in that behalf mentioned, and at the sum of £50 in respect of the residue of the time in the declaration in that behalf mentioned; and I do assess the damages sustained by the plaintiff, by reason of the delaying and retarding of the pulling down and rebuilding of the said house in the said declaration in that behalf respectively mentioned, otherwise than by the keeping and continuing of the said hoarding, at the sum of £100; and I do assess the damages sustained by the plaintiff, by reason of the carelessness, negligence, and improper conduct of the defendants, their agents, and workmen, in that behalf, in pulling down the house of the defendants in the declaration first mentioned, and in neglecting to use reasonable and proper precautions in that behalf, at the sum of £500; and I assess the damages sustained by the plaintiff by reason of the carelessness, negligence, and unskilfulness of the defendants, their agents, and workmen, in and about digging and clearing the ground for the

Assessment of damages separately.

For continuing the hoarding during the time in the Lord Mayor's licence.

For beyond the time licensed.

For delay in pulling down house.

For injury by defendants' negligence in pulling down house.

In underpinning party wall.

foundations of the house so built on the site of the house of the defendants in the declaration first mentioned, and in and about underpinning the party-wall between that house and the messuage of the plaintiff, and in and about moving a certain part of the said party-wall, and connected therewith, at the sum of £200.

Defendants not guilty of negligence in shoring up party-wall.

And as to so much of the premises in the declaration contained, as relates to the said careless, negligent, and improper conduct of the defendants in shoring up the party-wall between the house of the defendants in the declaration first mentioned, and the said messuage of the plaintiff's, I award and find, that the defendants are not guilty thereof.

Award as to second issue for defendants.

And as to the second issue joined between the said parties, I find that the defendants [*verifying all the facts stated in the second plea as to the necessity of the hoarding, the licence of the Lord Mayor and of the surveyor of pavements, as nearly as possible in the words of the plea, omitting, however, all mention of the custom*].

Award as to third issue for plaintiff.

And as to the third issue joined between the said parties, I find that the defendants did not [*following the words of the traverse to the third plea*].

Statement of facts at request of parties.

And I do, at the request of the parties, state the following matters for the opinion of the court [*here find specifically all the facts necessary to raise the questions of law requested by the parties to be raised. If one of the questions to be raised is, whether the custom set out in the said plea is not bad, and the plaintiff therefore entitled to judgment non obstante veredicto, proceed*]—I further state that the defendants, in their second plea, set out the following custom, that is to say, [*here follow the words of the plea*]; and I further state that the said custom was admitted by the replication to the second plea, the plaintiff having only traversed the residuum causæ as therein set forth.

Raising question as to validity of custom set out in plea.

Conditional award of judgment non obstante veredicto.

And if the court shall be of opinion that the second plea of the defendants, setting up and justifying under the said custom, is by reason of the badness of the said custom, not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the second plea, then, so far as I have power and authority so to do, I award and direct, that judgment be entered for the plaintiff for the amount of the damage by him sustained by reason of such grievances, notwithstanding the finding of the said second issue for the defendants (*i*).

Raising question whether licences put in evidence prove plea.

[*If another question be, whether the licences put in evidence sustained the licences alleged in the said plea, proceed*] and I further state that the licence granted by the said [*Lord Mayor*] and by the said surveyor of pavements respectively, and given in evidence by the defendants, were as follows [*here set out both licences verbatim*].

Conditional

And if the court shall be of opinion that the licences so given in

(*i*) See P. 2, ch. 6, s. 5, d. 2, p, 368, as to awarding an entry of judgment non obstante veredicto.

evidence do not support the allegation of licences contained in the said second plea, or are not a justification of the matters in the introductory part of that plea mentioned; then instead of the above finding for the defendants upon the second issue, I award and find, that the defendants, of their own wrong, and without the said residue of the said cause, committed the grievances in the introductory part of the said second plea mentioned, and thereby confessed (*k*). Award for plaintiff in case court of opinion plea not proved.

68. [*Verdict taken at Nisi Prius subject to a reference; action, trespass; plea, not guilty by statute. Arbitrator empowered to raise points of law for the court's opinion.*] I award and adjudge, that the verdict which has been entered for the plaintiff do stand, but that the damages be reduced to forty shillings, subject, however, to the provisions hereinafter contained. Award raising special point for the opinion of the court.

And for the purpose of raising certain points of law for the opinion of the court, I award and direct as follows—that the cause referred to me is an action of trespass for placing bricks, stones, and building materials, on the wall and close of the plaintiff; that the defendant has pleaded a plea of not guilty by statute; that the writ of summons in this action was issued on the 4th day of June, A. D. 1844, prior to the passing of the New Building Act, the 7 & 8 Vict. c. 84, and that the venue in this cause is laid in the county of Surrey. Statement of facts to raise point under the Building Act.

And I further award and find, that the houses of the plaintiff and defendant adjoin each other, being separated by a wall which has existed many years; that this wall is not a party-wall, or party-fence-wall, nor a wall in common between the plaintiff and defendant, but stands altogether on the land of the plaintiff, and is his wall exclusively; that the trespasses complained of in the action consist in the defendant's having made an addition to each end of the wall in question by building on it; that at the time of making such addition the defendant bonâ fide believed the wall to be a party-wall, and intended to comply with the Building Act then in force, stat. 14, G. III. c. 78; and that if the wall had been a party-wall, his building on it as he did, would have been justified by the statute; that the wall is not within the City of London or the liberties thereof, but is situate within the county of Surrey, and within the district over which the provisions of the stat 14, G. III. c. 78, extended; that the defence relied upon was, that the acts complained of were done in pursuance of the last-mentioned statute, and that consequently the venue was improperly laid in Surrey instead of in Middlesex.

And I further award and adjudge, if the court shall be of opinion upon the facts stated above, that the defendant was entitled, under the statute 14 G. III. c. 78, to rely on the objection, that the venue was not laid in Award of verdict for defendant, if court of

(*k*) See P. 2, ch. 5, s. 8, d. 5, p. 310, as to stating a case in an award.

opinion objection to venue open.

the county of Middlesex but in the county of Surrey; and was not prevented by the statutes 5 & 6 Vict. c. 97, and 7 & 8 Vict. c. 84, or either of them, from giving the special matter of such objection in evidence under the plea of not guilty by statute; or was at liberty to give such special matter in evidence under the common plea of not guilty; then that the verdict entered for the plaintiff be set aside, and instead thereof that a verdict be entered for the defendant.

Award raising point for opinion of the court.

69. [*Action, case for wrongfully and unskilfully making a sewer, by which plaintiff's house was damaged. Plea, not guilty. Arbitrator empowered to raise points of law.*] I award and find, that the defendant is clerk to the Commissioners of Sewers of the City of London and liberties thereof; and that a deep sewer has lately been made by order, and under the direction of the said commissioners, in Princes-street in the said city, and within the jurisdiction of the said commissioners, near to the dwelling-house of the plaintiffs in the declaration in the cause mentioned: that Princes-street is a narrow street, and that there are in most parts of it heavy buildings on one or other of the sides, and in some places on both sides of the street, one of which is the said house of the plaintiffs: that there are two modes of making a sewer practised in the City of London; the one by what is called tunnelling, and the other by what is called open cutting: that in Princes-street, as in most other narrow streets, with heavy buildings adjoining on them, a deep sewer cannot be made either by the one method or the other, without risk of damage to the adjoining buildings: that the amount of risk varies according to the nature of the soil; that the soil of Princes-street is such as to make the risk considerable, and that the nature of the soil was known, or might, by due inquiry, or proper experiments, have been known to the said commissioners before the making of the same: that the probability of damage accruing is in some degree less where the same is made by open cutting than by tunnelling: that the sewer in this case has been made by tunnelling: that the commissioners in directing the same to be made, and in the making of it, were acting bonâ fide in the honest discharge of their duty as commissioners; and that the sewer was fit and proper to be made for the convenient drainage of the City of London, and has been made in a workmanlike, skilful, and proper manner, in all respects, provided the commissioners were justified in making the same by the mode of tunnelling: that in consequence of the making of the sewer, the house of the plaintiffs has been damaged to the amount of four hundred pounds. Upon the whole matter, therefore, I find that if the commissioners were authorized to make the sewer by the mode of tunnelling, the verdict ought to be for the defendant: but, if the commissioners were bound to pursue the mode, which afforded the uttermost possible chance of preventing damage to the adjoining buildings, the verdict ought to be for the plaintiffs to the amount of £400.

Two modes of making a sewer, tunnelling and open cutting.

Open cutting less liable to cause injury.

Sewer in question made by tunnelling.

Damage to plaintiffs' house.

If tunnelling proper mode verdict for defendant, if not for plaintiff.

And thereupon I award, that the verdict which has been taken for the plaintiffs shall stand, if the court shall be of opinion that the verdict ought to be entered for the plaintiffs; but if the court shall be of opinion that the verdict ought to be entered for the defendant, then I award that the verdict already entered shall be set aside, and instead thereof that a verdict shall be entered for the defendant. Award of verdict conditional on court's opinion.

LXIX.

[*When a verdict has been taken on a reference at Nisi Prius subject to the certificate of the arbitrator.*] Certificate of arbitrator finding for the plaintiff.

In the Queen's Bench.

B. v. D. } Pursuant to the power conferred on me by an order of Nisi Prius made in this cause, I, X. Y. of [ ], barrister-at-law, do hereby certify, that the verdict which has been entered for the plaintiff do stand, but that the damages be reduced to £ [ ]. [*As in an award, the certificate should find on each issue. Directions as to the costs, so far as the arbitrator has power over them, may follow here*] (*l*).

X. Y.

To R. D., Esq. [*the associate or clerk of Nisi Prius*].

LXX.

To all to whom these presents shall come I, X. Y. of [ ], barrister-at-law, send greeting. Award, on an indictment referred, directing prostration of nuisance.

Whereas by a certain order of court, made at the assizes holden at Maidstone, in and for the county of Kent, on Monday, the 11th day of March, A. D. 1844, before the Right Honorable Lord Denman, Chief Justice of our Lady the Queen, Sir Edward Hall Alderson, Knight, one of the Barons of her Majesty's Court of Exchequer, Justices of our said Lady the Queen, appointed to take the assizes for the county of Kent: in a certain indictment then pending in the said court, wherein the Queen, on the prosecution of A. B., C. D., and E. F., was the prosecutrix, and Sir R. D. Knight, G. H., and I. K. were defendants; after reciting that the said defendants had consented to a verdict of guilty against them, upon condition that the prosecutors of the said indictment should enter into and be bound by the said order; it was ordered by the said court, with the consent of the said prosecutors and the said defendants, that I, the Recital of order of Nisi Prius. Verdict of guilty subject to reference.

(*l*) See P. 2, ch. 5, s. 2, p. 248; P. 2, ch. 6, s. 3, p. 351, 352, as to a certificate.

Power to arbitrator to order prostration of the embankment indicted as a nuisance.

said X. Y. should be empowered, and I was thereby empowered, to direct and order the prostration of the whole or any part of the embankment in the said indictment mentioned, which I should think fit; such directions and order to be conditional upon, and subject to the opinion of the Court of Queen's Bench with respect to any point or points of law that might arise to be stated as therein and hereinafter mentioned; so as I, the said arbitrator, should make and publish my award in writing concerning the matters referred, ready to be delivered to the said parties, or to either of them; or if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same; on or before the fourth day of the then and now next Michaelmas Term, or on or before any other day to which I should by any writing under my hand, to be indorsed thereon, from time to time enlarge the time for making my said award; and that I, the said arbitrator, should state for the opinion of the Court of Queen's Bench, at the request of the said prosecutors or defendants, or of any or either of them, any point or points of law that might be raised before me touching the matters referred to me by the said order. And it was thereby also ordered, that the costs of the said reference and award, to be taxed, should be in the discretion of me the said arbitrator, who might direct and award, to, and by whom, and in what manner, the same should be paid; and that I, the said arbitrator, should have the same power to amend the record, and to certify as a judge sitting at Nisi Prius would have upon a trial of the said indictment. And it was thereby also ordered, by and with such consent as aforesaid, that it should be in the judgment of me, the said arbitrator, to examine the said prosecutors and the said defendants, or any or either of them, who, together with their respective witnesses, should be examined upon oath; as by the said order, reference being thereunto had, will, among other things, more fully appear.

Subject to the opinion of the Court of Queen's Bench on any point of law.

Arbitrator to state points of law if requested.

Costs in discretion of arbitrator.

Power to amend the record and to certify.

Recital of judge's order empowering arbitrator to alter verdict of guilty.

And whereas by a certain other order afterwards made in this indictment by the Honorable Sir John Taylor Coleridge, one of the judges of her Majesty's Court of Queen's Bench, and purporting to bear date the 2nd day of July, 1844, the said last-mentioned judge did, upon hearing the attornies or agents on both sides, and by consent, thereby order that the arbitrator, to whom this indictment stood referred, should be at liberty to order the verdict of guilty already entered against the defendants to be set aside, and a verdict of not guilty to be entered instead thereof, on behalf of all or any of the defendants; as by the said last-mentioned order, reference being had thereto, will more fully appear.

Award de præmissis.

And whereas I, the said arbitrator, did, directly after the making of said first-mentioned order, take upon myself the burthen of the said arbitration, and have been attended by the counsel, attornies, and agents of the said prosecutors and the said defendants, and have examined upon oath all the witnesses which have been produced before me

by each of the said parties, touching the matters so referred to me as aforesaid; and have also viewed and inspected the said embankment in the said indictment mentioned; and have heard and maturely considered all the evidence which has been adduced before me, touching the matters so referred to me as aforesaid; and have not been called upon or requested during the said reference, by either the said prosecutors or defendants, or any or either of them, to state for the opinion of the Court of Queen's Bench any point or points of law that were raised before me touching the matters so referred to me as aforesaid, or to amend the record of the said indictment:—I, the said arbitrator, do therefore make this my award in writing, of and concerning the matters so referred to me as aforesaid, in manner following, that is to say,

Arbitrator not requested to raise point of law.

I do order, that the verdict of guilty already entered against the defendants be set aside, and instead thereof that a verdict of guilty be entered against the defendants, Sir R. D. & G. H., and a verdict of not guilty against the defendant, I. K.

Award of verdict of guilty as to some, not guilty as to other defendants.

And I do award, direct, and order, that the whole of the embankment in the said indictment mentioned shall with all reasonable speed, after the making and publishing of this my award, be prostrated by and at the expense of the said defendants, Sir R. D. & G. H.; and the materials thereof be taken and carried away; and the bed and soil of the river Thames, wherein the said embankment was erected, raised, and placed, be restored and made by them, at their expense, in the same state, in which the same was before the said embankment was begun to be erected, raised, and placed.

Direction to prostrate embankment.

. . . . . .

And I do hereby certify that the said indictment so referred to me was a proper indictment to be removed by certiorari, and to be tried by a special jury.

Certificate certiorari proper; and for special jury.

And I do hereby further award, order, and direct, that the costs of this reference and of this my award, when taxed, be paid on demand by the above-named defendants. Sir R. D. & G. H.

Award some defendants to pay costs of reference.

In witness whereof I, the above-named X. Y., have hereunto set my hand, this fifth day of October, 1844.

X. Y.

Signed and published the fifth day of October, A. D. 1844, in the presence of O. P.

LXXI.

Award on actions, cross accounts,

Whereas, at the assizes holden at Lewes, in and for the County of Sussex, on the [ ] day of [ ], A. D. [ ], before the Right Honorable Sir James Parke, Knight, one of the Barons of our Lady the

mortgages, right to property, and possession of premises.

Recital, reference of ejectment.

Of second action.

Other parties added.

All matters between all parties, referred.

Recital of arbitrator's powers.

Queen, of her Court of Exchequer, and the Right Honorable Sir Thomas Coltman, Knight, one of the Justices of her Court of Common Pleas, and others their fellow justices: on the trial of cause wherein John Doe, on the joint demise of O. C. & J. C., and on the several demises of F. & H., was plaintiff, and H. H. H. & H. M. H. were defendants; and on the trial of a certain other cause wherein W. P. was plaintiff and F. D. H. defendant: it was then and there ordered by the court, by and with the consent of the said parties, their counsel and attornies, and of E. S. H. & B. H.; that a verdict should be entered for the said plaintiff in the said first-mentioned cause, damages one shilling, costs forty shillings; but, that such verdict should be subject to the award, order, arbitrament, final end, and determination of me X. Y., Esq., barrister-at-law; who was thereby empowered to direct that a verdict should be entered for the plaintiff or defendant as I might think proper; and to whom also by the like consent the said first-mentioned cause and all matters in difference between the said lessors of the plaintiff, or any or either of them, and between H. H. H., H. M. H., E. S. H., F. D. H., & B. H., all or any of them, or between all or any of the said last-mentioned parties, jointly with F. D. H., and between any one or more of them and any other one or more of them, were thereby referred. And it was then and there further ordered by and with the like consent as aforesaid, that a verdict should be entered in the cause secondly above mentioned for the plaintiff, damages sixty-five pounds, costs forty shillings; but that such verdict should be subject to the award, order, arbitrament, final end, and determination of me, the said X. Y.; who was thereby empowered to direct, that a verdict should be entered for the plaintiff or the defendant, as I might think proper; and to whom the said secondly above-mentioned cause and all matters in difference between the said parties thereto were thereby referred: and that if I, the said arbitrator, should direct the verdict in the said last-mentioned cause to be entered for the last-mentioned defendant, that I the said arbitrator should direct that the said H. H. H., E. S. H., H. M. H., or some or any of them, should pay to the plaintiff in the said last-mentioned action his costs both of the action and reference, to be taxed as between attorney and client, including any costs which he, the said last-mentioned plaintiff, might have to pay to the said last-mentioned defendant, and should also pay to the said last-mentioned plaintiff the sum of sixty-five pounds paid by him for the purchase of the cows in question in the last-mentioned cause. And it was further ordered by and with such consent as aforesaid, that I, the said arbitrator, should have power to order and determine what I should think fit to be done by the parties to the said reference; so as I, the said arbitrator, should make and publish my award or awards in writing concerning the matters thereby referred, ready to be delivered to the said parties or any or either of them; or if they or any or either of them should be dead before the

making of the said award or awards, to their respective personal representatives, who should require the same; on or before the fourth day of the then next Michaelmas Term, or on or before any other day, to which I, the said arbitrator, should by any writing under my hand, indorsed on the said order, from time to time enlarge the time for making my said award or awards. And it was also ordered that the costs of the cause firstly above-mentioned to be taxed should abide the event of the said award as to the above first-mentioned cause; and that the costs of the said reference and award or awards, to be taxed, should be in the discretion of me, the said arbitrator, who might direct to, and by whom, and in what manner the same should be paid.

Enlargement of time by the arbitrator.

And whereas I, the said arbitrator, did by two several indorsements on the said order enlarge the time for making my award or awards, of and concerning the said causes and matters, until the first day of September, A. D. 1847.

Award de præmissis.

Now I, the said arbitrator, having taken upon myself the burthen of the said arbitration, and having heard and maturely weighed and considered the several allegations, vouchers, and proofs brought before me by and on behalf of the said several parties to the said reference; in pursuance of the said reference, do make and publish this my award in writing of and upon the premises: that is to say,

As to ejectment.

As to the first-mentioned cause; I award that instead of the verdict entered for the plaintiff in the said first-mentioned cause, that as to the issue joined on the first count in the said cause, a verdict shall be entered for the defendant; and as to the issue joined on the second count in the said first-mentioned cause, that a verdict shall be entered for the plaintiff, damages one shilling, costs forty shillings.

As to second cause.

And as to the secondly above-mentioned cause; instead of the verdict entered for the plaintiff, I award and direct as to the first issue joined in the said last-mentioned cause, that the verdict shall be entered for the plaintiff, and that the costs of that issue shall be paid by the defendant to the plaintiff. And as to the second issue joined in the said last-mentioned cause, I direct that the verdict shall be entered for the defendant, and that the costs of that issue shall be paid by the plaintiff to the defendant. And as to the third issue joined in the said last-mentioned cause, I award and direct that the verdict shall be entered for the defendant, and that the costs of that issue shall be paid by the plaintiff to the defendant.

Costs as between attorney and client.

And I further direct and order H. H. H. to pay to the plaintiff in the said last-mentioned cause his costs, to be taxed as between attorney and client, including the costs which the plaintiff in the last-mentioned cause will have to pay to the defendant in the said last-mentioned cause upon the verdict hereinbefore ordered to be entered for the defendant on the second and third issues in the said cause.

And I further direct and order H. H. H. to pay to the plaintiff in the said last-mentioned cause the sum of £65, the price of the cows in question in the said cause, and also any costs, to be taxed, to which the said plaintiff may have been or may be put, in and about this reference.

Award as to farming stock.

And as to the several matters in difference referred to me by the said order, I award and determine, that H. H. H., E. S. H., & H. M. H., are not, nor are any or either of them, entitled to one-fourth or any part of the value of the farming stock claimed by them.

Claim for indemnity.

That H. H. H., E. S. H., & H. M. H., are not, nor are any or either of them, entitled to any indemnity from F. D. H. for any loss which may ensue to them or either of them by reason of the failure of the plaintiff in the said secondly above-mentioned cause.

Farming accounts.

And with respect to the farming accounts between H. H. H., E. S. H., & H. M. H., I determine as follows; that is to say:—that there is due from H. H. H. to F. D. H., on the said accounts, the sum of £314; and from E. S. H. to F. D. H. on the said accounts the sum of £314; and from H. M. H. to F. D. H. on the said account the sums of £251:—that there is not anything due on the balance of the said farming accounts from the said F. D. H. to the said H. H. H., E. S. H., & H. M. H., or any or either of them.

That there is due on the said farming accounts from the said H. H. H. to the said H. M. H. the sum of £63.

That there is due from the said E. S. H. to the said H. M. H. on the said farming accounts the sum of £63.

Other than farming accounts.

With respect to the claim made by F. D. H. against H. H. H. & H. M. H. jointly, but irrespective of, and distinct from, the said farming accounts, I award, that there is due from the said H. H. H. & H. M. H., jointly, to the said F. D. H. the sum of £360; and I award and order, that each of them, the said H. H. H. & H. M. H. shall pay to the said F. D. H. the sum of £180, being one moiety of the said sum of £360 at the time hereinafter directed.

Private accounts.

I further award, that there is due from H. H. H. to F. D. H., on the private account between them, and irrespective of the sums above mentioned, the sum of £127. I further award, that there is due from the said H. M. H. to the said F. D. H., on the private account between them, and irrespective of the sums above mentioned, the sum of £46.

Claim to plate.

I further award, that F. D. H. is entitled to one-fifth part of the plate which formerly belonged to his mother, A. H., deceased, and which was in the messuage called Dykes, on the [ ] day of [ ], A. D. [ ].

Direction to pay.

I further award, that the several sums of money hereinbefore determined and found to be due from H. H. H., E. S. H., & H. M. H., respectively, to F. D. H., shall be paid by the said H. H. H., E. S. H., H. M. H., respectively, to the said F. D. H., on the 25th day of Decem-

ber, A. D. 1848; unless in the meantime a sale of the property in mortgage to O. C. & J. C. shall have taken place; in which case the said several sums of money shall be paid when and as soon as such sale shall be completed and the purchase-money paid to the vendors or vendor (*m*).

I further award, that the several sums hereinbefore found to be due to H. M. H. from H. H. H. & E. S. H. respectively, shall be paid by them respectively to the said H. M. H. on the said 25th day of December, 1848; or if such sale as hereinbefore mentioned shall take place in the meantime, as soon as such sale shall be completed and the purchase-money paid to the vendors or vendor.

And I award, that other than and except the sums above mentioned there is not anything due to the said F. D. H. from the said E. S. H. & H. M. H. jointly, or from the said E. S. H. separately.

Directions to mortgagees to sell property.

I further direct, that, (unless in the meantime a sale thereof shall be effected by C. E. C. or J. C., or the survivor of them or his heirs, or their or his assigns, under a certain indenture bearing date the 19th day of August, 1842,) all the property comprised in, and conveyed by, a certain indenture, dated the 16th day of September, 1845, to T. G. W., deceased, and to the said O. C. & J. C., shall, on the 29th day of September, A. D. 1848, or as soon after as conveniently may be, be sold by the said O. C. & J. C., or the survivor of them; and that the surplus money arising from such sale, after payment of the expenses of and attending such sale, and of the principal sum of £12,500 to the said mortgagees, and all interest thereon, and also after the payment of the sum of £2,500, and all interest due thereon, to B. H. and her assigns, by virtue of her charge on the said property, shall be paid by the vendors or vendor to the said C. E. C. & J. C., or the survivor of them or his heirs, or their or his assigns, (if they will accept the same); and if they decline to accept the same, then that the said surplus shall be paid unto and between H. H. H., H. M. H., E. S. H. & F. D. H. in equal shares and proportions, or their respective executors, administrators, and assigns. And I direct that all parties to this reference except W. P. shall concur in and do all in their power to effectuate such sale.

To pay off mortgagees.

As to surplus.

Parties to concur in sale.

Amount of mortgage due.

I further award, that the principal sum of £12,500 remains due to the said O. C. & J. C. on mortgage of the property comprised in, and conveyed by, the said indenture of the 16th of September, 1845; and that all interest on the said sum of £12,500, calculated de die in diem up to, and inclusive of, the 21st day of July, A. D. 1847, has been paid, except the sum of £55. 10*s*. 7*d*., which still remains due to the said mortgagees: and that in case the property so mortgaged shall be sold by the said C. E. C. & J. C. under the trusts of the deed of the 19th of August, 1842, the said O. C. & J. C. (the mortgagees) shall not, nor shall the survivor

(*m*) See P. 2, ch. 8, s. 1, d. 2, p. 399, as to awarding time of payment.

of them, his executors, administrators, or assigns, require or be entitled to any notice of the re-payment of the said principal sum of £12,500.

Award as to costs of reference and award.

And I further order and direct, that the costs of this reference and of the several parties in relation thereto (except the costs of W. P., the plaintiff in the said secondly above-mentioned cause, which are hereinbefore directed to be paid by H. H. H.), and the costs of this my award shall be paid and borne by H. H. H., H. M. H., E. S. H., & F. D. H., in equal shares and proportions.

Parties to deliver up possession of premises.

Lastly, I direct, that H. H. H. & H. M. H. shall, on the 29th day of September next, quit and deliver up possession to the said F. D. H. of the messuage called Dykes, and the other premises for which they have been admitted to defend the said first-mentioned cause: and that E. S. H. & B. H. shall, if in possession thereof or any part thereof, quit and deliver up the same to the said F. D. H. on the same day.

In witness whereof I have hereunto set my hand this [ ] day of [ ], A. D. 1847.

X. Y.

Signed and published in the presence of
O. P., clerk to the said X. Y.

LXXII.

Award containing special directions as to removing obstructions and regulating the water-way before the plaintiffs' premises.

To all to whom these presents shall come I, X. Y., of the Middle Temple, barrister-at-law, send greeting.

Recital of order of Nisi Prius.

Whereas by a certain order of court made at the assizes holden at Maidstone, in and for the county of Kent, on Monday, the eleventh day of March, one thousand eight hundred and forty-four, before the Right Honorable Lord Denman, the Chief Justice of our Lady the Queen, and the Honorable Sir Edward Hall Alderson, Knight, one of the Barons of her Majesty's Court of Exchequer, Justices of our Lady the Queen, appointed to take the assizes for the said county of Kent: in a certain cause then pending in the said court, wherein R. D. & J. S. were plaintiffs, and E. G., J. W., & W. S. F. were defendants; it was ordered by the said court, with the consent of the said parties, their counsel, and attornies, that a verdict should be entered for the said plaintiffs, with damages to the amount in the declaration mentioned, and costs forty shillings; but that such verdict should be subject to the award, order, arbitrament, final end, and determination of me, the said X. Y.; who was thereby empowered to direct, that a verdict should be entered for the plaintiffs or defendants as I should think proper; to whom the said cause was thereby referred.

And I was thereby empowered to order and determine, what I should think fit to be done by either of the said parties with respect to the removal of any of the obstructions charged in the declaration in the said cause; and for the regulution of the water-way to, and from, and in front of the premises of the said plaintiffs and their tenants; and for the settlement of all matters in the said action; so as I, the said arbitrator, should make and publish my award in writing concerning the matters so referred, ready to be delivered to the said parties or to either of them; or if they or either of them should be dead before the making of my said award, to their respective personal representatives, who should require the same; on or before the fourth day of the then and now next Michaelmas Term, or on or before any other day, to which I, the said arbitrator, should by any writing under my hand to be indorsed thereon, from time to time enlarge the time for making my said award. And it was thereby further, by and with such consent as aforesaid, ordered, that I, the said arbitrator, should state for the opinion of the court, at the request of either party to the said action, any point or points of law that might be raised before me. And it was thereby also ordered, that the costs of the said cause, to be taxed, should abide the event of the said award; and that the costs of the said reference and award, to be taxed, should be in the discretion of me, the said arbitrator, who might direct and award to, and by whom, and in what manner the same should be paid: and that I, the said arbitrator, should have the same power to amend the record, and to certify, as a judge sitting at Nisi Prius would have upon a trial of the said cause. And it was thereby also ordered, by and with such consent as aforesaid, that it should be in the judgment of me, the said arbitrator, to examine the said parties; who, together with their respective witnesses, should be examined upon oath; as by the said order, reference being had thereunto, will, amongst other things, more fully appear.

Power to order what to be done with respect to removal of obstructions, and regulation of water-way, and settlement of matters in the action.

And whereas I, the said arbitrator, did, shortly after the making of the said order, take upon myself the burthen of the said arbitration, and have been attended by the counsel, attornies, and agents of the said parties, and heard all their evidence touching the matters so referred to me as aforesaid; and have also viewed and inspected the obstructions charged in the declaration in this action, and the water-way to, and from, and in front of, the premises of the said plaintiffs and their tenants; and have not been called upon or requested by any or either of the parties to the said action to state for the opinion of the court any point or points of law that were raised before me; or to amend the record in this action:—I do therefore make this my award in writing of and concerning the matters so referred to me as aforesaid in manner following: that is to say:—

Award de præmissis.

I do award, order, and direct, that the verdict in this action already entered for the said plaintiffs be set aside, and that instead thereof a verdict be entered for the defendants on the issues firstly, thirdly, fifthly,

On the action.

and lastly, within joined between the said parties; and that a verdict be entered for the plaintiffs on all the other issues joined between the said parties in the said action.

Certificate for special jury.

And I do hereby certify, that this was a proper cause to be tried by a special jury.

Award as to costs.

And I do further award, order, and direct, that the costs of the reference and of this my award, of all the parties, when taxed, shall be added together in one sum, and divided into three equal parts; and that when so divided two equal third parts thereof shall be paid and borne by the said plaintiffs, and the other remaining third part thereof shall be paid and borne by the said defendants; and that if any or either of the said parties shall pay or shall have paid more than his just share or proportion of the said costs according to the proportions hereinbefore mentioned, that he or they shall be repaid the excess by the party or parties whom I have before directed to pay the same in the proportions already mentioned.

As to power to say what to be done.

And with reference to the authority given to me by the said order to order and determine, what I shall think fit to be done by either of the said parties with respect to the removal of any obstructions charged in the declaration; and for the regulation of the water-way to, and from, and in front of, the premises of the said plaintiffs and their tenants; and for the settlement of all matters in this action:—

Finding of facts.

I do find, that the messuages and premises of the said plaintiffs in the declaration in this action mentioned adjoin on the north on the bed, shore, and water of the river Thames, for the space of sixty-nine feet and eleven inches; and that the easternmost of the said messuages and premises, and in the first count of the declaration described as being in the possession and occupation of H. R. C. as tenant thereof to the said plaintiffs, abuts in part on the eastern side thereof on certain public stairs called Garden Stairs; and that at the time of the committing of the alleged grievances in the said declaration mentioned, and for many years before, the said stairs, called Garden Stairs, were and still are public landing stairs for all the liege subjects of our Lady the Queen and her predecessors to land and embark at Greenwich from and into boats and other vessels on the river Thames at all times of the year at their free will and pleasure; and that until the year one thousand eight hundred and thirty-six the said stairs were accessible to the public on the eastern side thereof, but that in or shortly after that year a certain pier was erected on the eastern side of the said stairs by a certain company called the Greenwich Pier Company (and in which said company the said plaintiffs were and still are the holders of a large number of shares), which, since its erection, has cut off and still does cut off all access for the public to the said stairs on the eastern side thereof.

And I further find, that until the erection and making of a certain embankment hereinafter mentioned, and the putting or throwing out of a

certain brow, stage, or platform, across and athwart a part of the said river as hereinafter also mentioned, the said stairs, called Garden Stairs, were accessible to the public on the western side thereof; but that in the year one thousand eight hundred and forty-three the said plaintiffs erected and in part built a certain embankment on the western side of the said stairs, in front of their said messuages and premises in the declaration mentioned, adjoining on one side the said stairs called Garden Stairs, and extending from their said messuages and premises in the declaration mentioned in a northernly direction for the depth of sixty feet and upwards into the said river; and that the said defendants, about the same period, put out and threw out a certain brow, stage, or platform, across and athwart a part of the said river to the westward of the said embankment of the said plaintiffs, whereby access to the said stairs on the westward side thereof for row boats, skiffs, and wherries, has ever since been, and still is, greatly obstructed.

And I further find, that that part of the bed, shore, and water of the said river which so adjoins the said messuages and premises of the said plaintiffs as aforesaid, and whereon the said plaintiffs have erected and in part built their said embankment as aforesaid, from time whereof the memory of man runneth not to the contrary, until the erection of the said embankment and the putting or throwing out the said brow, stage, or platform as hereinbefore mentioned, had been used, and of right ought to have been used, and still of right ought to be used, by watermen and others plying at the said stairs, called Garden Stairs, with boats for hire, to land and embark passengers there; and to stow and moor their boats on the bed, shore, and water of the said river, along the whole extent and frontage of the said messuages and premises; and for watermen plying for hire at Garden Stairs, and occupying or residing in any of the messuages or premises of the said plaintiffs in the declaration mentioned, to get into and from their boats, skiffs, and wherries lying upon the said part of the said bed, shore, and water of the said river, from and unto their said messuages and premises; and that during all that time there ought to have been, and still of right ought to be, convenient access for row boats, skiffs, and wherries, to the said stairs, called Garden Stairs, from the north.

And I further find, that before the introduction of steam navigation on the river Thames, great numbers of the liege subjects of the kings and queens of England, having occasion to land and embark at Greenwich, from and into row boats, skiffs, and wherries, were used and accustomed to land and embark, and of right landed and embarked at the said stairs; but that for the last sixteen years or thereabouts, and since the introduction of steam navigation on the said river, and in consequence thereof, very few of the said liege subjects have been used and accustomed to land and embark at the said stairs from and into row boats, skiffs, and wherries; and very great numbers who, but for the accommodation

afforded to the public by the said steam-boats, would have required to land and embark at the said stairs from and into row boats, skiffs, and wherries, have required to land and embark there on the western side from and into steam-boats.

And I further find, that the landing and embarking of passengers at the said stairs, called Garden Stairs, from and into steam-boats, is a great accommodation to the public at large, and especially to the inhabitants of Greenwich and its neighbourhood, and to all persons resorting to those places; and that in the present state of the river Thames there are not sufficient landing-places provided for the use of the public steam-boats, which navigate and ply for hire upon the said river from Greenwich, to land and embark passengers there; and that the said stairs, called Garden Stairs, are capable, from their greatly diminished use as a public landing and embarking stairs from and into row boats, skiffs, and wherries, and from their breadth, (which I find to be nowhere less than sixteen feet from top to bottom, and a still greater width on the strand or causeway below the said stairs,) of affording accommodation to all persons desirous of landing or embarking there, as well from and into row boats, skiffs, and wherries, as from and into steam-boats; and that the said stairs, and the strand and causeway thereof, may be so used without detriment to the public; and that the occasions and necessities of the public, and of a great majority of those who reside at Greenwich and its neighbourhood, and of those who resort there, require that they should be so used.

And I further find, that the steam-boats cannot conveniently be brought alongside Garden Stairs for the purpose of landing or embarking passengers there; and that the most convenient mode of landing and embarking passengers from and into steam-boats at and from Garden Stairs is by means of a barge or barges, dummy or dummies, moored in the said river near to the said stairs, and communicating with the said stairs by means of bridges, brows, platforms, or stages; and that such barge or barges, dummy or dummies, bridges, brows, platforms, or stages, may conveniently be moored, and placed, put out, and erected, in the manner hereinafter described, without detriment to the public, or impediment to the navigation of the said river, or the public use of Garden stairs for the purposes of landing or embarking there from or into row boats, skiffs, and wherries, or obstructing convenient water-ways to the said messuages and premises of the said plaintiffs in the said declaration mentioned.

And I further find, that the said Company, called the Greenwich Pier Company, have, since the erection of the said pier, put out, and placed, and used, and still do use, certain barges or dummies in front of their said pier for the more convenient landing and embarking passengers at and from their pier, from and into steam-boats extending many feet into the water-way of the said river beyond their said pier.

Now, with respect to so much of the matters so referred to me, as empowers me to order and determine, what I shall think fit to be done

by either of the said parties with respect to the removal of any of the obstructions charged in the declaration:—

Directions as to the removal of obstructions.

I do hereby order, determine, and direct, as between the parties in this action, that, as soon as the embankment hereinbefore mentioned has been prostrated by the said plaintiffs, and the materials thereof taken or carried away, and the bed and soil of the river Thames restored and made in the same state, in which the same was before the said embankment was commenced, (and which I have ordered the said plaintiffs to do by a certain other award (*u*) bearing even date herewith), or sooner, if practicable; the said defendants shall, with all reasonable speed, at their own expense, remove all and every barge, plank, dummy, rafter, timber, chain, cable, iron, rope, or other material, now belonging to the said defendants, or any of them, which now lie, or are placed in or upon the said river, or the bed or soil thereof, between the westernmost of the said messuages and premises in the said declaration mentioned, and in the fourth count of the declaration described as being in the possession of the said plaintiffs, and the said public stairs, called Garden Stairs; or within sixty feet, measuring from each of the said messuages and premises in the said declaration mentioned in a northernly direction; or along or across the said river or the bed or shore thereof, in any part thereof to the west of the westernmost of the said messuages and premises of the said plaintiffs, within sixty feet of the southern shore of the said river; and all and every barge, plank, dummy, rafter, timber, chain, cable, iron, rope, or other material, belonging to the defendants or any of them, which extends further out into the stream of the said river than the said barge or barges, dummy or dummies, now used by the said Company, called the Greenwich Pier Company.

Directions as to regulating the water-way.

And with respect to so much of the matters referred to me as empowers me to order and determine, what I shall think fit to be done by either of the said parties for the regulation of the water-way to, from, and in front of, the premises of the said plaintiffs and their tenants:—

I do hereby further order, determine, and direct, as between the parties in this action, that from and after the removal of the said embankment and obstructions, which I have hereinbefore, and in my said other award directed to be removed in the manner and at the times so by me directed; the said plaintiffs and their tenants shall at all times have a clear water-way (when there is sufficient water) to, from, and in front of, the said messuages and premises in the said declaration mentioned, from the west of the westernmost of their said messuages and premises for the clear space of sixty feet, measuring in a northernly direction, and extending from the said westernmost messuage all the way eastward to Garden Stairs; and another clear water-way of six feet wide in a north-easternly

(*u*) See award on indictment, Form LXX.

direction from the easternmost of the said messuages and premises, and in the first count of their declaration described as being in the possession and occupation of the said H. R. C. as tenant thereof to the said plaintiffs; and that the said defendants shall not, nor shall any or either of them, at any time after such removal of such embankment and such obstructions as aforesaid, put, or place, or have, or use, upon the said river, or upon the bed or shore thereof, any barge, plank, dummy, rafter, timber, chain, cable, iron, rope, or other material, upon any part of the water, bed, or shore of the said river within the limits hereinbefore defined, whereby the said water-ways for the said plaintiffs and their tenants, hereinbefore specified, or either of them, may be in any way obstructed; and that, subject to the said water-ways so reserved and provided for the said plaintiffs and their tenants, the said defendants shall have a water-way in front of the said messuages and premises of the said plaintiffs in the said declaration mentioned to and from the said stairs, called Garden Stairs, to land and embark passengers there from and into steam-boats.

Directions as to settlement of matters in the action.

And with respect to so much of the matters referred to me, as empowers me to order and determine, what I shall think fit to be done by either of the said parties for the settlement of all matters in this action; and one of the matters in difference between the parties in this action being as to the right of the said defendants to land and embark passengers at Greenwich from and into steam-boats at the stairs, called Garden Stairs, by means of barges or dummies placed opposite the said messuages and premises of the said plaintiffs:—

I do hereby further order and determine, as between the parties in this action, that so long as the said stairs, called Garden Stairs, shall continue to be a public landing stairs, "and until another as convenient public landing stairs as Garden Stairs shall be provided for the public using steam-boats on the river Thames to and from Greenwich," (*o*) the said defendants shall and may have one barge or dummy for the purpose of landing and embarking passengers from and into steam-boats in the river Thames at and from Garden Stairs aforesaid, not exceeding the length of eighty-six feet, and the breadth of fifteen feet and a half, near to Garden Stairs aforesaid, in that part of the said river which lies opposite to the said messuages and premises of the said plaintiffs in the said declaration mentioned; so as the same does at no time hereafter approach to the said messuages and premises of the said plaintiffs nearer than sixty feet from the northern boundary of the said messuages and premises; and so as at no time hereafter the said barge or dummy shall extend further out from the south shore of the said river into the stream of the said river, than the barge or barges, dummy or dummies, now used by the said Company, called the Greenwich Pier Company; and so as at no time the said barge or dummy of the said defendants shall be allowed to ground;

(*o*) Whether this is sufficiently precise as to time, see P. 2, ch. 8, s. 2, d. 8, p. 420.

and also a certain other barge or dummy, commonly called a monkey barge, (not exceeding the width of eight feet and ten inches,) on that part of the bed, shore, strand, causeway, or water of the said river, which lies in a line northwards with the bottom stair or step of the said stairs, called Garden Stairs, on the easternmost side of the said bed, shore, strand, causeway, or water; and also such and so many bridges, brows, and stages communicating with the said barges or dummies, and that part of Garden Stairs which comprises eight feet thereof in width on the easternmost side of the said stairs from the top to the bottom thereof; so as the said defendants leave between the said barges or dummies a clear width of water-way, when there is sufficient water, and strand and causeway when there is not, of six feet for row boats, skiffs, and wherries to pass from and to the north-east to and from the said stairs, called Garden Stairs, and to and from the said messuages and premises of the said plaintiffs in the said declaration mentioned; and so as the said defendants leave sufficient head room under their barges, brows, or stages, communicating between one barge or dummy and their other barge or dummy, for persons using the said water-way to and from the north-east, to pass under the same sitting in their boats, skiffs, or wherries; and so as such bridges, brows, or stages, as shall communicate with or extend over the said stairs, called Garden Stairs, shall not exceed eight feet in width, and shall be carried up, and put, and placed, and continued on that part of the said stairs, called Garden Stairs, which comprises eight feet in width on the easternmost side thereof; and so as at all times to leave the westernmost eight feet in width of the said stairs, and of the strand and causeway at the foot thereof, for watermen and others having occasion to land or embark passengers at or from Garden Stairs, into and from row boats, skiffs, and wherries, for their free use; and so as at all times that all and every such barge, dummy, bridge, brow, or stage, which shall be used by the said defendants, or any of them, for any of the purposes aforesaid, shall have good and substantial railings, with proper openings therefrom and thereto, to prevent accidents to persons using the same.

Plaintiffs not to interfere with defendants' use of the water-way awarded.

And I do hereby further order and direct, that the said defendants using their said barges, dummies, bridges, brows, and stages, and the said stairs, called Garden Stairs, in manner and for the purposes hereinbefore directed, shall have, use, and enjoy the same, free from all acts of interruption by the said plaintiffs, or either of them, or any person or persons claiming by, from, or under them: and that neither of the said plaintiffs shall bring, prosecute, or carry on, against any or either of the said defendants, any proceedings at law or equity for erecting, placing, or using any of the said barges, dummies, bridges, brows, or stages, in the manner hereinbefore by me directed and authorized, or using the said water-way hereinbefore provided for them, or the said stairs in the manner hereinbefore provided.

Map annexed to be part of award.

And for the purpose of showing and explaining the manner and direction in which I intend the said barges, dummies, monkey-barge, bridges, brows, and stages, to be erected, placed, and used, by the said defendants, I annex a plan thereof to this my award, and intend it to be taken as a part thereof.

In witness whereof I have hereunto set my hand, this seventh day of October, 1844.

X. Y.

LXXIII.

Award of compensation by umpire for lands taken under the Lands Clauses Consolidation Act.

To all to whom these presents shall come, I, A. L. B., of [ ], in the county of Lancaster, mine agent, send greeting.

Recital, Company authorized to take land.

Whereas by virtue of the "North Staffordshire Railway (Pottery Line) Act, 1846," and "The North Staffordshire Railway (Churnet Valley Line) Act, 1846," and of certain other acts of parliament incorporated with the above acts, the North Staffordshire Railway Company were authorized to take, for the purposes of a certain railway about to be constructed by them, the piece or parcel of land and buildings, part of a coal-wharf and buildings; which part is hereinafter particularly mentioned in the schedule signed by me hereunder written and described on the plan signed by me hereto annexed, and colored red on the said plan.

Notice by Company land required.

And whereas, on or about the 6th day of January now last past the said Company duly gave notice in writing to J. H., S. B., & J. G., of [ ], in the parish of [ ], in the county of Stafford, coal masters and co-partners, the tenants or lessees of the said land and buildings so described in the said schedule, and colored red in the said plan; that they required and intended to take the same for the purposes of the said railway; and that they were willing to treat for the purchase of the interest of the said J. H., S. B., & J. G. therein, and as to the compensation to be made to them for the damage that might be sustained by them by reason of the execution of the works of the said railway; and in and by the said notice the said Company required the said J. H., S. B., & J. G., to deliver a statement in writing of the particulars of their estate and interest in the said land and buildings, and of the claim made by them in respect thereof.

Demand of particulars of interest and claim.

Particulars of interest and claim for compensation.

And whereas, in pursuance of the said last-mentioned notice, the said J. H., S. B., & J. G., on or about the 26th day of January last past, by a statement in writing, informed the said Company, that they, the said J. H., S. B., & J. G., were lessees of the said land and buildings for a term of twenty-one years from the 24th day of June, 1839, under a lease from J. A., Esq., of L——, aforesaid; and that they claimed the sum £3,380 as compensation for the value of their said land and buildings so

to be taken as aforesaid, and for the damage which would be sustained by them by reason of the execution of the works of the said railway, and of the severing of such land and buildings from their other lands and buildings.

Compensation offered by the Company.

And whereas the said Railway Company offered to pay to the said J. H., S. B., & J. G., the sum of £600 as and for the compensation for the value of the said land and buildings, and for such damage as aforesaid, and have not offered to pay any other or larger sum whatever in respect of the same.

Difference as to amount of compensation.

And whereas the said J. H., S. B., & J. G., and the said Railway Company did not agree as to the amount of compensation to be paid as aforesaid, but a dispute arose between them as to the same.

Demand of arbitration by landowner.

And whereas the said J. H., S. B., & J. G., by a notice in writing under their hands, dated on or about the 18th day of August last, and delivered to the said Company before the said Company had issued their warrant to the sheriff to summon a jury in respect of the said land and buildings, signified their desire to the said Company to have the amount of compensation settled by arbitration; and in the said notice stated the interest in respect of which they claimed compensation and the amount of compensation claimed by them, and the dispute respecting such amount which they required to be settled by arbitration.

And whereas the said J. H., S. B., & J. G., and the said Company, did not concur in the appointment of a single arbitrator.

Notice to Company to appoint their arbitrator.

And whereas by the notice last aforesaid the said J. H., S. B., & J. G., required the said Company to nominate and appoint an arbitrator on their part to whom the said dispute respecting the said compensation should be referred.

Appointment of arbitrator by the landowner.

And whereas the said J. H., S. B., & J. G., on or about the 30th day of August last, duly nominated and appointed, by writing under their hands, J. H. B., of L——, aforesaid, auctioneer and surveyor, to be an arbitrator, to whom the question of such compensation as aforesaid should be referred, and delivered the said appointment to the said J. H. B.

Appointment of arbitrator by the Company.

And whereas, pursuant to the said notice, the said Company, on or about the 13th day of September last, duly nominated and appointed, in writing under the hands of two of the directors of the said Company, G. M'D., of C——, in the said county of Stafford, surveyor, to be an arbitrator, to whom the question of such compensation as aforesaid should be referred, and delivered the said appointment to the said G. M'D.

Arbitrators subscribed declaration.

And whereas the said arbitrators, before they entered into the consideration of any of the matters so referred to them as aforesaid, respectively duly made and subscribed in the presence of a justice duly authorized in that behalf, the declaration required by the before-mentioned acts.

And whereas the said arbitrators, before they entered upon the matters so referred to them, did on the 18th day of September last, in pursuance of the said statutes, by writing under their hands, duly nominate and ap-

Arbitrators appointed umpire.

point me, the before-mentioned A. L. B., to be the umpire in the matter of the said arbitration.

Arbitrators undertook the reference.

And whereas the said arbitrators took upon themselves the burthen of the reference, and duly heard and considered the allegations and proofs of the said J. H., S. B., & J. G., and of the said Company, respectively, concerning the amount of the said compensation.

Arbitrators enlarged the time.

And whereas the said arbitrators, on or about the first day of October last, and within twenty-one days after the appointment of the last of the said arbitrators, by writing under their hands, duly appointed an extended time for the making of their award, namely, until the 19th day of November instant.

Arbitrators disagreed, and made no award,

And whereas the said arbitrators disagreed and differed respecting the matters referred to them, and by reason of such differences between them failed to make their award either within twenty-one days after the day on which the last of the said arbitrators was appointed, or within the extended time for making their award so appointed as aforesaid; whereby the matters referred to the said arbitrators aforesaid duly came before me as umpire for determination.

Umpire undertook reference.

Now know ye that I, the said A. L. B., having taken upon myself the burthen of the reference; and having before entering upon or taking into consideration any of the matters referred to me, duly made and subscribed, in the presence of a justice duly authorized in that behalf, the declaration required by the said acts, which said declaration is hereunto annexed; and having been attended by the parties and their witnesses, and having heard and considered the allegations and proofs of the respective parties, and having viewed the said land and buildings; and having also in making this my award regarded not only the value of the interest of the said J. H., S. B., & J. G., in the land and buildings so to be taken by the said Company as aforesaid, but also the damage to be sustained by the said J. H., S. B., & J. G. by reason of the severing of the land and buildings so to be taken from the other lands of the said J. H., S. B., & J. G., and by the otherwise injuriously affecting such other lands by reason of the exercise by the said Company of the powers contained in the said acts:—do make this my award, in writing, of and concerning the premises in the manner following; that is to say,

Subscribed declaration annexed.

Considered value and consequential damage.

Award.

Sum due as compensation.

For land taken.

For severance.

And other injuries.

I do award, settle, order, and determine, that there is due from the said Railway Company unto the said J. H., S. B., & J. G., the sum of £2,805 as and for the purchase-money and compensation for the interest of the said J. H., S. B., & J. G., in the said land and buildings so intended to be taken as aforesaid; and for all damages to be sustained by the said J. H., S. B., & J. G., by reason of the severing of the said land and buildings from the other lands and buildings of the said J. H., S. B., & J. G.; and the otherwise injuriously affecting such other lands and premises, by the exercise by the said Railway Company of the powers contained in the said acts.

And whereas the sum of £2,805, which I have above awarded as such compensation, is greater than the sum offered by the said railway company as such compensation, whereby the costs of and incident to this arbitration are to be borne and paid by the said railway company; I further award, adjudge, and settle the amount of the costs of this arbitration, and incident thereto, incurred by the said J. H., S. B., & J. G., at the sum of £ [ ], and the amount of the costs of and incident to the award, at the sum of £ [ ]. Recital company liable to costs. Award assessment of costs. Of party. Of award.

As witness my hand this twenty-fourth day of November, A. D. 1847.

A. L. B.

Signed and published on the day and year last above-mentioned, in the presence of J. F. S.

The schedule above referred to. Schedule.

Parish or place and county in which the lands and hereditaments required are situate.	Number on Map or plan, and in the book of reference deposited with the Clerk of the Peace of county of Stafford.	Description of the lands and hereditaments required.	Quantity of the lands and hereditaments required.		
			Acres.	Rods.	Perch.
L. in the parish of S. in the county of Stafford.	189	Part of a coal wharf and buildings.	0	0	27

A. L. B.

Signed by the said A. L. B. on the day and year last above-mentioned, in the presence of J. F. S.

[*Let the plan be annexed, signed, and attested.*]

I, A. L. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act. [*Here recite the name of the special act or acts.*] Declaration subscribed and annexed.

A. L. B.

Made and subscribed in the presence of [*name of the justice*]

The third day of November, A. D. 1847.

LXXIV.

Award amended on reference back.

[*Award defective for a mistake in the Christian name of one of the parties, and for deciding a cause by directing a verdict to be entered without any authority so to direct. This may be indorsed on the award.*] Whereas by a rule of the Court of Common Pleas, made the [ ] day of [ ] last, it was ordered, that my award should be referred back to me to reconsider and amend the same if I should think fit; now I the within-named arbitrator having reconsidered this my award within written, do hereby declare and award, that the same ought to be amended by substituting the name Joseph Howett for the name James Howett wherever such last-mentioned name occurs in the said award: and that the said award ought now to be read, as if the name Joseph Howett had originally stood therein, instead of the name James Howett, in every instance where such last-mentioned name occurs; the name James Howett having been therein inserted by mistake, instead of the name Joseph Howett, and Joseph Howett being the person thereby meant and intended by me.

And whereas with respect to the cause in which the said Joseph Howett is the defendant, I by my within award did award, order, and adjudge in the words following: "that a verdict shall be entered for the defendant, James Howett," meaning the said Joseph Howett:—now I award and direct, that the following amendment be made, that is to say, that the words "that a verdict shall be entered for the defendant, James Howett," shall be deemed to be expunged and erased from the said award, and that the award be read as if they had never been inserted, and that the following words, "that the defendant therein is not guilty of the grievances laid to his charge, or any or either of them, or of any part thereof," be inserted and read in my award in lieu of the words directed to be deemed erased and expunged (*p*).

LXXV.

Award confirmed by arbitrator on reference back.

Whereas by a certain order of Nisi Prius, made on the trial of a cause in which A. B. was the plaintiff, and C. D. the defendant, it was ordered among other things that the said cause, and all matters in difference between the said parties, should be referred to the award of me, X. Y. of [ ], as by reference to the said order will more fully appear.

And whereas I the said X. Y. did, pursuant to the said order, on the [ ] day of [ ], make and publish my award in writing

(*p*) See P. 2, ch. 4, s. 1, d. 16, p. 198; P. 3, ch. 9, s. 8, p. 658, as to referring back.

of and concerning the matters referred by the said order of Nisi Prius.

And whereas by a rule of the Court of Queen's Bench, made the [ ] day of [ ], A. D. [ ], it was ordered that it should be referred back to me, the said arbitrator, to reconsider the amount of the damages awarded by me to the plaintiff in the said cause, and that the costs of the further reference and award should be in my discretion.

Now I the said X. Y. having taken upon myself the burthen of this further reference, and having heard and duly considered the allegations and proofs further made and adduced by the said parties, and having, in pursuance of the said rule, reconsidered the amount of the said damages; do hereby award and declare, that I see no reason to alter the amount of the said damages, and I do therefore hereby confirm my former award, and direct it to stand as to the said damages.

And I further award and order, that the said C. D. shall pay and bear the costs of this my second award, and also pay to the said A. B. his costs of and incidental to this second reference.

In witness whereof, &c.

PLEADINGS.

LXXVI.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

[*County*] to wit. } A. B. by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B. in an action on promises. For that whereas before the making of the promise of the defendant hereinafter next mentioned, certain differences had arisen, and were then depending between the plaintiff and defendant; thereupon, for the putting an end to the said differences, the plaintiff and defendant heretofore to wit, on the [ ] day of [ ], A. D. [ ], [*date of submission, or thereabouts,*] and before the commencement of this suit, mutually submitted themselves to the award of one X. Y., to be made between them of and concerning the said differences; and in considera-

Declaration in assumpsit on an award.

Recital differences existing.

Averment mutual submission.

tion thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil the award of the said X. Y., to be so made between the plaintiff and defendant of and concerning the said differences, in all things on the plaintiff's part to be performed and fulfilled; he, the defendant, then promised the plaintiff to perform and fulfil the said award in all things therein contained, on the defendant's part to be performed and fulfilled. And the plaintiff, in fact saith, that the said X. Y., having taken upon himself the burthen of the said arbitration, afterwards to wit, on, [*date of award, or thereabouts,*] and before the commencement of this suit, made his certain award between the plaintiff and defendant of and concerning the said differences; and did thereby award that the defendant should on [ ], pay to the plaintiff the sum of £100, in full satisfaction and discharge of the said matters in difference. Of which said award the defendant, afterwards to wit, on the day and year last aforesaid had notice. And although he, the defendant, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, was requested by the plaintiff to pay him the said sum of £100, according to the tenor and effect of the said award and his said promise; yet the defendant not regarding his said promise did not, nor would, on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards, pay the said sum of £100, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. To the plaintiff's damage of £ [ ], and thereupon he brings his suit (*a*).

Mutual promises to perform award.

Arbitrator made award.

Awarded defendant to pay money.

Notice to defendant.

Request to defendant to pay.

Defendant not paid.

LXXVII.

Indebitatus count on an award in assumpsit.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

[*County*] to wit. } A. B. by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B. in an action on promises. For that whereas the defendant, on the [ ] day of [ ], A. D. [ ], was indebted to the plaintiff in £ [ ], upon and by virtue of a certain award made by X. Y., upon and by virtue of a certain submission made by the plaintiff and defendant to the award, order, and determination of the said X. Y., of and concerning the matters in difference then depending between the plaintiff and defendant, and upon and by virtue of which reference the said X. Y. had awarded that the defendant should pay a certain sum of money, to wit, the said last-mentioned sum of money to the said plaintiff.

(*a*) See P. 3, ch. 3, s. 1, d. 2, p. 484, as to assumpsit on an award. P. 3, ch. 3, s. 2, d. 1, p. 491, as to pleading an award.

And thereupon the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, then promised to pay the said last-mentioned sum to the plaintiff on request. Yet he hath disregarded his promise, and has not paid to the plaintiff the said sum, or any part thereof. To the plaintiff's damage of £ [ ], and therefore he brings his suit.

LXXVIII.

In the Court of Common Pleas.

The [ ] day of [ ], A. D. [ ].

Kent } M. D. by O. P., her attorney, complains of E. B. and J. C., executors of the last will and testament of J. B. deceased, who have been summoned to answer the said M. D. in an action on promises. For that whereas before the making of the promise and undertaking of the defendants, hereinafter mentioned, certain differences had arisen, and a certain suit was then depending in the High Court of Chancery, in which the said plaintiff, M. D., was plaintiff, and P. H., J. B. since deceased, and J. R., were defendants: and thereupon afterwards, and before the commencement of this suit, on the 14th day of June, A. D. 1823, by an order of Sir John Leach, Vice-Chancellor, it was amongst other things ordered, with the consent of the attornies of the parties in the said suit, that the several matters in question in the suit, and all disputes and differences then subsisting between the said plaintiff, M. D., and P. H., and J. B., since deceased, should be referred to the award, arbitrament, final end, and determination of M. C.; who was to be at liberty to make one or more award or awards of and concerning the matters thereby referred to him, as he should think fit; so as such award or awards should be made in writing under the hand and seal of the said M. C., ready to be delivered to the said parties, or to such of them as should require the same; on or before the 23rd day of June then next, or on or before any such ulterior day or days as the said M. C. should from time to time appoint in writing, by indorsement upon the said order; and in case either of the said parties should happen to die before the making the final award under the said reference, the reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the order, in like manner as their testator or intestate. And the plaintiff further says, that before the making of the award hereinafter mentioned, to wit, on the 28th day of June, A.D. 1824, the said J. B. died. And the plaintiff further says, that the said arbitrator, before the said 23rd day of June, to wit, on the 20th day of June, A. D. 1823, by indorsement in writing on the said order, enlarged the time for making his award until the last day of Trinity Term, A. D. 1825, and that the

Declaration in assumpsit against executors of party dying pending the reference.

Recital of differences.

Averment reference by order of Chancery.

Death of party.

Enlargement of time by arbitrator.

said arbitrator, during the said enlarged time for making his award, to wit, on the 7th day of July, A. D. 1824, made his award in writing, under his hand and seal, between the parties aforesaid, of and concerning the said matters referred; and did thereby (among other things) award, that the defendants, as executors of the said J. B. deceased, should out of the assets of the said J. B., on the 27th day of July then next, between the hours of eleven and twelve in the forenoon, at the chambers of Mr. B. B. of Furnival's Inn, in the county of Middlesex, pay to the plaintiff the sum of £225; of which award the defendants, executors as aforesaid, afterwards, to wit, on the 7th day of July, in the year last aforesaid, had notice; by reason of which said promises the defendants, as executors as aforesaid, became liable to pay to the plaintiff the said sum of £225, according to the tenor of the said award; and being so liable, they the defendants, as executors as aforesaid, afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], in consideration thereof, undertook and faithfully promised the plaintiff to pay to her the said sum of £225, at the time and in manner as in the award was directed.

Award made.

Award (among other things) defendants to pay out of assets.

Notice to defendants.

Promise by defendants.

Defendants not paid.

And the plaintiff further says, that though the defendants, executors as aforesaid, to wit, on the said 27th day of July, which day had elapsed before the commencement of this suit, were requested to pay the said sum of £225 to the plaintiff, according to the tenor and effect of the said award; yet the defendants, executors as aforesaid, not regarding their promises and undertaking, did not, nor would, when so requested, nor at any time before or since, pay the said sum of £225, or any part thereof, to the plaintiff, but have wholly neglected and refused so to do. To the plaintiff's damage of £ [ ], and thereupon she brings her suit.

LXXIX.

Declaration in assumpsit by arbitrators for their costs of the award.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

Middlesex to wit. } A. B., C. D., and E. F., by O. P. their attorney, complain of G. H., and I. K., who have been summoned to answer the said A. B., C. D., and E. F., in an action on promises.

Recital cause depending.

For that whereas before the making of the promise hereinafter mentioned, a cause was depending in the Court of Common Pleas, wherein the now defendants were plaintiffs, and L. M. was defendant. And whereas before the making of the promise hereinafter mentioned, to wit, on the [ ] day of [ ], A. D. [ ], by a certain order then made by Sir Thomas Coltman, Knight, then being one of the justices of our Lady the Queen, of her Court of Common Pleas, the said Sir Thomas Coltman

Judge's order of reference.

did, with the consent of the now defendants, and the said L. M., order that all matters in difference between the now defendants, and the said L. M., should be referred to the award, order, final end, and determination of the said plaintiffs, A. B., and C. D., and of such third person as they should by writing under their hands appoint in that behalf, or of any two of them; so as they, or any two of them, should make and publish their award in writing, &c. [*Here recite the rest of the order of reference, but in the past tense.*] And whereas afterwards, and before the making of the promise hereinafter mentioned, by a memorandum in writing, dated the [ ] day of [ ], A. D. [ ], under the hand of the plaintiffs, A. B., and C. D., and made before the plaintiffs A. B., and C. D., entered on the said matters in difference, the plaintiffs, A. B., and C. D., did duly nominate the plaintiff, E. F., to be the third arbitrator to whom, together with them the plaintiffs, A. B., and C. D., the matters should be referred, according to the tenor of the said order; of all which premises the defendants then had notice; thereupon the defendants afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], in consideration that the plaintiffs, at the request of the defendants, would take upon themselves the burthen of the reference, undertook and promised the plaintiffs to pay them their fair and reasonable costs of the said award, in such manner, and at such times, as the plaintiffs, as such arbitrators, should by their said award in writing direct and appoint. And the plaintiffs, in fact, say, that they the said plaintiffs, confiding in the said promise of the defendants, did then accept and take upon themselves the burthen of the reference, and did afterwards, to wit, on the [ ] day of [ ], A. D. [ ], and on divers other days and times, proceed in and with the said reference, and hear, examine, and consider the allegations and proofs made and adduced by the said parties thereto; and did afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], duly make and publish their award in writing under their hands, of and concerning the matters in difference so referred to them, ready to be delivered to the said parties in difference; and did thereby, among other things, award, order, and direct, that the costs of the said award of the plaintiffs, amounting to £191. 19*s*, should be in the first place paid to the plaintiffs by the now defendants immediately after the execution of the said award; but that that the sum of £95. 19*s*. 6*d*., being one moiety, or equal half part thereof, should be repaid by the said L. M. to the now defendants, at the expiration of twelve months from the date of the said order: whereof the defendants afterwards, to wit, on the [ ] day of [ ], A. D. [ ], had notice. Yet the defendants not regarding their said promise, did not, nor would, pay to the plaintiffs the said sum of £191. 19*s*., or any part thereof, although the said sum is the

Appointment of third arbitrator.

Averments, promise by defendants to pay plaintiffs' fees.

Plaintiffs thereon undertook reference.

Duly made their award.

Awarded defendants to pay them their costs.

Notice to defendants.

Defendants not paid.

fair and reasonable costs of the plaintiffs of the said award; and although a reasonable time for the payment thereof has elapsed before the commencement of this suit; but have wholly neglected and refused, and hitherto wholly neglect and refuse, so to do. To the damage of the plaintiffs of £ [ ], and therefore they bring their suit (*b*).

LXXX.

Plea of an award in assumpsit in bar of an action.

Submission by agreement.

Mutual promises.

Award made.

And for a further plea in this behalf the defendant says, that after the making of the promises in the said declaration mentioned, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], the plaintiff and defendant mutually submitted themselves to refer, and did then refer all matters in difference between them to the award of X. Y., so as the said award should be made in writing. And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, in consideration that the defendant had then promised the plaintiff to perform and fulfil the said award, in all things on the part of the defendant to be performed and fulfilled, the plaintiff then promised the defendant to perform and fulfil the said award in all things on his the plaintiff's part to be performed and fulfilled. And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ] A. D. [ ], the said X. Y. having taken upon himself the burthen of the said reference, made his award in writing of and concerning the premises so referred to him as aforesaid, and thereby directed the defendant to pay to the plaintiff £ [ ], in full satisfaction and discharge of all the said matters in difference so referred as aforesaid, as by the said award, reference being thereunto had, will more fully appear. And this the defendant is ready to verify (*c*).

LXXXI.

Declaration in debt on an award on a submission by bond.

Recital of differences.

In the Queen's Bench.

The [ ] day of [ ] A. D. [ ].

Kent, to wit. } A. B., by E. F. his attorney, complains of C. D., who has been summoned to answer the said A. B. in an action of debt. And the plaintiff demands of the defendant the sum of £ [ ], which the defendant owes to and unjustly detains from him. For that

(*b*) See P. 2, ch. 9, s. 1, p. 434, as to the right of the arbitrator to sue.

(*c*) See P. 3, ch. 3, s. 3, p. 502, as to the effect of an award as a plea.

whereas certain differences having arisen between the plaintiff and the defendant, thereupon afterwards, to wit, on the [ ] day of [ ], A. D. [ ], the plaintiff, by a certain bond of arbitration, became and was bound to the defendant in a certain penal sum in the said bond mentioned; and on the day and year last aforesaid, the defendant, by a certain bond of arbitration, became and was bound to the plaintiff in a certain penal sum in the said last-named bond mentioned; which bonds were respectively conditioned, in all things well and truly to abide by, stand to, observe, perform, fulfil, and keep the award of X. Y., an arbitrator elected and appointed by the plaintiff and defendant to arbitrate, award, and finally determine touching all matters in difference between them; so as the said arbitrator should make his award in writing, signed by him, ready to be delivered to the parties, or if they, or either of them, should be dead before the making of the award, to their respective personal representatives who should require the same, on or before the [ ] day of [ ] next. And the plaintiff further says, that the said X. Y. having taken upon himself the burthen of the reference, did afterwards, and within the time in that behalf limited, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], make his award in writing, signed by him, of and concerning the matters referred, ready to be delivered to the said parties; and did thereby, among other things, award and order the defendant to pay to the plaintiff the sum of £ [ ]; of all which premises the defendant had notice, to wit, on the day and year last aforesaid. Yet the defendant, though often requested, has not paid to the plaintiff the said sum of £ [ ], in the said award mentioned, or any part thereof, but has hitherto wholly neglected and refused, and still neglects and refuses so to do. Whereby an action has accrued to the plaintiff to demand, and have of and from the defendant the said sum of £ [ ], parcel of the said sum above demanded. (*d*).

Averment, submission by bond.

Award made.

Ordering defendant to pay.

Notice to defendant.

Defendant not paid.

LXXXII.

[*Commence in the ordinary manner in actions by assignees.*]

For that whereas heretofore to wit, and before the making of the order of reference hereinafter mentioned, an action on promises by the now plaintiff, as such assignee, had been brought to recover the sum of £1,000 due to the said insolvent, Jonas Ingram, for goods sold and delivered by him to the defendant, and for money due on account stated: to which action

Declaration in debt on an award by assignee of insolvent.

(*d*) See P. 3, ch. 3, s. 1, d. 3, p. 486, as to debt on an award. P. 3, ch. 3, s. 2, p. 491, as to pleading an award.

Reciting action by assignee.

the defendant pleaded non assumpsit; that the plaintiff was not assignee; payment to the insolvent before action brought; payment to the assignee before action brought; and a set-off for work and labour: and the plaintiff traversed the plea of payment and set-off; and issue was joined on all the pleas. Thereupon, afterwards, the cause being about to be tried at the assizes; by a certain order, in writing, of Sir Thomas Coltman, Knight, one of the judges of her Majesty's Court of Common Pleas, and the then Judge of Assize, made, to wit, on the [ ] day of [ ], A. D. [ ], it was (among other things) ordered, by the consent of the parties to the action, that the record should be withdrawn, and that all matters in difference in the action and between the parties should be referred to arbitration; so that the arbitrator should make his award, in writing, of and concerning the matters referred, ready to be delivered to the parties, or either of them, on or before the 1st day of November then next ensuing, or within such time or times as he should on the said order indorse; and also, that the parties should in all things abide by, perform, and keep the award of the said arbitrator; that the costs of the said action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator; and also that the order of reference should be made a rule of court. And the plaintiff further says, that in the said order of reference the christian name of the said insolvent was, by mistake, written Joseph instead of Jonas. And the plaintiff further says, that after the making of the said order of reference, and before the said last-mentioned first day of November, to wit, on the 28th day of October, A.D. 1844, the said arbitrator took upon himself the burthen of the reference, and by indorsement on the order of reference, then duly enlarged the time for making his award until the 1st day of Michaelmas Term, A. D. 1845; before which day, to wit, on the first day of November, A.D. 1844, the said judge made a further order, in writing, that the said order of reference be amended by altering the name of Joseph therein mentioned to that of Jonas, and that the arbitrator should proceed to make his award; which amendment was made accordingly. Of all which premises the plaintiff and the defendant then had due notice. And the plaintiff further says, that afterwards, and before the said enlarged time for making the said award had elapsed, and before the commencement of this suit, to wit, on the 22nd day of January, A. D. 1845, the said arbitrator did make and publish his award in writing, of and concerning the matters referred, and did thereby find and award all the issues joined in the said cause for the plaintiff, except so much of the issue joined on the said first plea as related to the last count of the declaration, which the arbitrator thereby found for the defendant: that the plaintiff, as such assignee, was entitled to recover from the defendant on the first count the sum of £372. 3*s.*; and the said arbitrator assessed the damages of the plaintiff on the first count at £372. 3*s.*, which sum the arbitrator then ordered,

Averment, reference by order of the judge of assize.

Mistake in name of insolvent in the order of reference.

Enlargement of time.

Judge's order to amend mistake.

Notice to defendant.

Award made.

Defendant to pay d mages.

awarded, and directed the defendant to pay to the plaintiff, or his attorney or agent. And the said arbitrator thereby further declared that the defendant never made any payment to the plaintiff for, or in respect of, the causes of action in the first count mentioned, or any part thereof. And the arbitrator thereby awarded and declared, that in finding the said sum of £372. 3*s*. to be due to the plaintiff, and assessing the said damages as aforesaid, he had allowed to the defendant, and given credit to him for all and singular the sum and sums, which were ever paid by the defendant to the said Jonas Ingram, before he became such insolvent debtor as in the declaration mentioned, for or in respect of the causes of action in the said first count mentioned, or any part thereof. And the said arbitrator further awarded, that no further proceedings should be had save the taxation of the costs of the award: and touching and concerning the matters in dispute between the said parties out of the said cause, that neither of the parties at the time of making the order had any claim or demand against the other. And the said arbitrator also awarded the defendant to pay the costs of the reference and award; of which award the defendant afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice. And the plaintiff further says, that after the making of the said award, and before the commencement of the present suit, to wit, on the [ ] day of [ ], A. D. [ ], the said orders of the said judge were made a rule of her Majesty's Court of Exchequer; and that afterwards, and before the commencement of this suit, to wit, on the 18th day of February, A. D. 1845, the costs of the plaintiff were taxed at £280. 15*s*.; of which the defendant then had notice; and was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff to pay the respective sums of £372. 3*s*. and £280. 15*s*., pursuant to the said award. And the plaintiff further says, that although a reasonable time for the payment thereof had elapsed before the commencement of this suit, the defendant did not, nor would, pay the same or any part thereof, but has hitherto neglected and refused, and still neglects and refuses, so to do.

Defendant to pay costs of reference and award.

Notice to defendant of award.

Order made rule of court.

Taxation of costs.

Notice to defendant.

Defendant requested to pay.

Defendant not paid.

LXXXIII.

[*The declaration may be on a common money bond without condition, or it may recite the condition in the usual manner, and then allege the making of the award and the breaches, as in the form given in the replication to a plea of no award. See Form LXXXV*] (*e*).

Declaration in debt on the arbitration bond.

(*e*) See P. 3, ch. 3, s. 1, d. 4, p. 487; on the arbitration bond.
P. 3, ch. 3, s. 2, d. 2, p. 498, as to debt

LXXXIV.

[*When the declaration does not set forth the condition.*]

Plea of no award in debt on the arbitration bond.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

D. ats. B. } The defendant by O. P., his attorney, craves oyer of the said writing obligatory in the said declaration mentioned, and it is read to him; and he also craves oyer of the condition of the said writing obligatory, and it is read to him in these words [*here set forth the whole condition verbatim*]; which being heard and read, the defendant says, that the said X. Y., the arbitrator named in the said condition, did not, on or before the said [ ] day of [ ], A. D. [ ], in the said condition mentioned, make any award, in writing under his hand, of and concerning the premises in the said condition mentioned and so referred as aforesaid, ready to be delivered to the said parties in difference, or to such of them as should require the same [*as the case may be; for the plea should traverse the mode of making the award prescribed by the condition*]. And this the defendant is ready to verify (*f*).

LXXXV.

Replication in debt on the arbitration bond to a plea of no award, setting forth the award and breaches.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

A. B. v. C. D. } And the plaintiff as to the plea of the defendant by him [firstly] above pleaded says, that the said X. Y., the arbitrator in the said condition of the said writing obligatory mentioned, within the time limited and appointed by the said condition for the making his award, and before the commencement of this suit, that is to say, on the [ ] day of [ ], A. D. [ ], did duly

Arbitrator made award.

make his award, in writing under his hand, of and concerning the premises in the said condition mentioned, and thereby referred to him as aforesaid, ready to be delivered to the said parties in difference, or to such of them as should require the same; by which said award the said arbitrator did then award [*here set out the whole of the awarding part of the award in the past tense*]; of which said award the defendant afterwards, to wit, on the [ ] day of [ ], A. D. [ ],

Notice to defendant.

had notice. And the plaintiff further says, that the defendant has not [*here state the breach of the award; if the award be for payment of money it may be as follows:* " though often requested, paid to the plaintiff the said sum of £ [ ] in the said award mentioned, or any part thereof,

Breach.

(*f*) See P. 3, ch. 3, s. 4, d. 2, p. 506, as to pleading no award.

but has hitherto wholly neglected and refused, and still neglects and refuses, so to do"]. [*If there has been another breach, add*] And for assigning a further breach of the said award and of the said condition of the said writing obligatory, the plaintiff further says that [*here state the further breach, following as near as may be the words of the award*]. Further breach.

And this the plaintiff is ready to verify (*g*).

LXXXVI.

And the defendant, as to the replication of the plaintiff to the said [first] plea of the defendant, says, that the said X. Y. did not make any such award of or concerning the said premises in manner and form as the plaintiff has above, in his said replication, alleged; and of this the defendant puts himself upon the country (*h*). Rejoinder no such award to replication setting forth award.

LXXXVII.

[*After craving oyer of the bond and condition*]; which being read and heard, the defendant says, that after the making of the said writing obligatory, and before the [ ] day of [ ], A. D. [ ] [*the limit for making the award*], and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], the said X. Y. duly made his award, in writing under his hand, of and concerning the premises in the said condition mentioned, and so referred to him as aforesaid, ready to be delivered to the said parties in difference, or to such of them as should require the same; by which said award the said X. Y. did thereby award [*here set out the whole of the award without the recitals*]. And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ], he, the defendant [*allege performance by the defendant of everything the award ordered the defendant to do, as near as may be in the words of the award, laying time for each act*]. Plea of award and performance in debt on the arbitration bond.

And this the defendant is ready to verify (*i*).

(*g*) See P. 3, ch. 3, s. 2, d. 2, p. 498, as to pleadings in debt on the arbitration bond.

(*h*) See P. 3, ch. 3, s. 4, d. 2, p. 507, as to pleading no award.

(*i*) See P. 3, ch. 3, s. 4, d. 4, p. 511, as to pleading performance.

LXXXVIII.

Declaration in covenant on a submission by deed.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ].

Kent to wit. } A. B. by E. F., his attorney, complains of C. D., who has been summoned to answer the said A. B. in an action on covenant. For that whereas, heretofore and before the making of the award hereinafter mentioned, to wit, on the [ ] day of [ ], A. D. [ ], by a certain indenture then made between the plaintiff of the one part and the defendant of the other; which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into court, the date whereof is the day and year aforesaid; after reciting that the plaintiff was possessed of a certain messuage for a term of years under a lease from the defendant, and that divers questions and differences had arisen between the plaintiff and defendant touching the said messuage and lease, and that to put an end to the said questions and differences it had been agreed to refer the same to the award and final determination of X. Y.; each of the said parties did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the other, his heirs, executors, and administrators, well and truly to stand by, obey, perform, and keep the award of the said X. Y. of and concerning all matters in difference between the said parties touching the said messuage and lease, as by the said indenture, reference being thereunto had, will more fully and at large appear.

Profert of indenture.

Recital of differences.

Covenant to abide award.

And the plaintiff further says, that the said X. Y. afterwards, and before the commencement of this suit, to wit, on the [ ] day of [ ], A. D. [ ], made and published his award, in writing, of and concerning the premises so referred to him as aforesaid; and thereby ordered the defendant within two months from the making of the said award, at his own costs and charges, to put the said messuage into good and tenantable repair; of which said award the defendant, to wit, on the day and year last mentioned, had notice. And the plaintiff further says, that the defendant, although afterwards, and after the making of the said award, to wit, on the [ ] day of [ ], A. D. [ ], requested by the plaintiff so to do, did not, nor would, within two calendar months from the making of the said award, which period has long elapsed before the commencement of this suit, or at any other time, put the said messuage into good and tenantable repair, as in the said award directed, but has hitherto wholly neglected and refused so to do, contrary to the tenor and effect of the said indenture and of the said covenant of the defendant in that behalf made as aforesaid. And so the plaintiff says that he, the defendant, has not kept with him the covenant so made between them as aforesaid, but has broken the same, and to keep

Arbitrator made award.

Ordering defendant to repair messuage.

Notice to defendant of award made.

Defendant not repaired.

the same with the plaintiff the defendant has hitherto wholly refused and still does refuse. To the damage of the plaintiff of £ [ ], and thereupon he brings his suit (*k*).

PROCEEDINGS ON THE AWARD.

LXXXIX.

In the "Queen's Bench," [*or* "Common Pleas," *or* "Exchequer of Pleas."]

O. P., of [ ], maketh oath and saith, that on the [ ] day of [ ], A. D. [ ], this deponent was present, and did then see C. D. duly execute the bond or obligation hereunto annexed; and that the said C. D. did then sign, and as his act and deed deliver, the said bond or obligation in the presence of this deponent; and that the name C. D. at the foot thereof is of the proper hand-writing of the said C. D.; and that the name O. P. subscribed to the said bond as the witness thereof is of the proper hand-writing of this deponent (*a*). Affidavit of execution of bond of submission.

O. P.

Sworn, &c.

XC.

In the "Queen's Bench" [*or* "Common Pleas," *or* "Exchequer of Pleas."]

Between A. B. plaintiff, and C. D. defendant.

[*When there is no cause in court omit all title of the parties, or say,* "In the matter of the arbitration between A, B. & C. D."]

O. P., of [ ], maketh oath and saith, that he this deponent, did, on the [ ] day of [ ], A. D. [ ], see X. Y. "sign and publish" [*or* "sign, seal, and publish," *as the case may be*], Affidavit of execution of an award.

(*k*) See P. 3, ch. 3, s. 1, d. 5, p. 488, as to covenant on a submission by deed.

(*a*) See P. 3, ch. 5, s. 1, p. 546, as to making the submission a rule of court.

" the award, in writing, hereto annexed [*or* " his award, in writing, between A. B., of [ ], and C. D., of [ ], bearing date the day and year aforesaid"]. And this deponent further saith, that the name X. Y. set and subscribed to the said award as the party executing the same is of the proper hand-writing of the said X. Y.; and that the name O. P. set and subscribed thereto as witness attesting the execution of the said award, is of the proper handwriting of this deponent (*b*).

O. P.

Sworn, &c.

XCI.

In the Queen's Bench.

In the matter of W. B. and the [ ] Railway Company.

Affidavit verifying copy of award on motion to set aside award.

W. H., of [ ], solicitor for the above W. B., maketh oath and says, that this deponent, on the [ ] day of [ ], received from M. T., the solicitor for the above-named company, a copy of the award made by M. P. in the matter above-mentioned; and which said copy of the said award is hereunto annexed; and which said award was taken up, and is now in the possession of the said M. T. as such solicitor as aforesaid, or of the said company, as this deponent verily believes (*c*).

W. H.

Sworn in court this [ ] day of [ ], 1847.

XCII.

Affidavit of enlargement of time.

And this deponent further saith, that the time for making the said award was on the [ ] day of [ ], A.D. [ ], duly enlarged to the [ ] day of [ ] A. D. [ ], by the writing under the hand of the said X. Y. indorsed on the said bond [*or other submission, as the case may be*]; and this deponent further saith, that the name of the said X. Y. set and subscribed to the said indorsement is of the proper hand-writing of the said X. Y.; and this deponent further saith, that the said award was made and published on the [ ] day of [ ], A. D. [ ], and within the enlarged time for making and publishing the same.

(*b*) See P. 3, ch. 6, s. 3, d. 1, p. 573, as to verifying the award.

(*c*) See P. 3, ch. 9, s. 4, d. 1, p. 640, as to sufficiently verifying the award.

XCIII.

In the Queen's Bench.

Trinity Term, in the 7th year of Queen Victoria,
Monday the 22nd day of July, 1844.

Rule making submission by bond a rule of court.

In the matter of arbitration between A. B. and C. D. } Upon reading the affidavit of O. P., and the bond or obligation thereunto annexed, bearing date the 9th day of August last past, and duly executed by A. B. of [ ], in the county of [ ], esquire, to C. D. of [ ], in the said county, corn dealer; reciting, as therein is recited: that whereas [*here set out the recitals in the condition of the bond in the past tense*] :—and upon reading the condition of the said obligation, and it thereby appearing that if [*here set out the condition on which the bond is to be void in the past tense*];—and it thereby appearing, that it was agreed by and between the said A. B. and C, D. [*here set out the agreement as to making the submission a rule of court, as to the powers of the arbitrator, and the rest of the terms in the condition.*] [*If the time has been enlarged, add,* " and upon reading a memorandum indorsed on the said bond, dated the [ ] day of [ ] now last past; whereby it appears, that X. Y., the arbitrator in the said bond of submission named, did, pursuant to the power given him by the terms of submission in the said condition to the said bond or obligation, thereby enlarge the time for making his award on the matters therein referred to his determination, until the [ ] of [ ] then next ensuing"] :—It is therefore ordered, that such the submission [*if the time has been enlarged add,* " and memorandum "] made in manner aforesaid, be entered and made a rule of this court. Upon the motion of Mr. [ ] (*d*).

Making enlargement of time part of the rule.

By the Court.

XCIV.

In the Queen's Bench.

The [ ] day of [ ], A. D. [ ],
[ ] Term, [ ] Victoria.

Rule making a judge's order a rule of court.

A. B. v. C. D. } It is ordered that an order made " by the Right Honorable Thomas Lord Denman, the Lord Chief Justice of this court"]*or* " by the Honorable Sir James Patteson, Knight, a Judge of this court"], at his chambers in Rolls Garden, bearing date the [ ] day of [ ], be entered and made a rule of this court, which said order is in the words following, to wit [*here set out the whole order verbatim*]. Upon the motion of Mr. [ ].

By the Court.

XCV.

[*Entitle this as the preceding Form* XCIV.]

Rule making an order of Nisi Prius a rule of court.

A. B. v. C. D. } It is ordered that an order made " at the sittings of Nisi Prius, holden at [ ], on [ ], before" [*describe the sittings at Nisi Prius. If the order was made at the assizes, state it ac-*

(*d*) See P. 1, ch. 3, s. 3, p. 57, as to the effect of making the submission a rule of court.

cordingly], be entered and made a rule of this court, which said order is in the words and figures following, to wit, [*here set out the whole order verbatim*]. Upon the motion of Mr. [ ].

By the Court.

XCVI.

Vice-Chancellor of England.

Wednesday, the [ ] day of [ ], in the [ ] year of the reign of her Majesty, Queen Victoria, 1848.

Order making submission order of Chancery.

In the matter of the arbitration between A. B. & C. D.

And in the matter of the statute the 9 & 10 William III., entitled "An Act for determining Differences by Arbitration."

Upon motion this day made unto this court by Mr. E. of counsel for the said A. B., and upon producing "an agreement" [*or* "bonds of submission," *or* "a deed"], bearing date the [ ] day of [ ], and "signed by the said A. B, & C. D." [*or* "signed by G. H., solicitor for the said A. B., and by I. K., solicitor for the said C. D."], as by affidavit appears; it was, therefore, prayed that the said "agreement" [*or* "bonds of submission, *or* "deed,"] may be made an order of this court, and be observed and performed by all parties thereto, according to the tenor and true meaning thereof. Which is ordered accordingly. Mr. F. of counsel for the said C. D. consenting thereto.

XCVII.

In the Queen's Bench.

Trinity Term, Monday, the [ ] day of July, 1848, in the 12th year of Queen Victoria.

Rule making submission under the "Lands Clauses Consolidation Act" a rule of the Queen's Bench.

In the matter of the arbitration between the London and North Western Railway Company, under "The Lands Clauses Consolidation Act, 1845," and O. P.

Upon reading the affidavit of K. L. [*verifying appointment of arbitrator by the Company*], and the appointment of arbitrator or submission to arbitration on the part of the London and North Western Railway Company, under "The Lands Clauses Consolidation Act, 1845," and bearing date the [ ], day of [*date of appointment*], and duly executed "by A. B. & C. D., two of the directors of the said Company" [*or* "by E. F., secretary to the said Company,"] thereto annexed, the affidavit of L. M. [*verifying appointment of arbitrator by the landowner*], and the appointment of arbitrator or submission to arbitration on the part of the said O. P., bearing date the [ ] day

of [*date of appointment*] thereto annexed, it is ordered that the said two several appointments of arbitrators, or submission to arbitration, be respectively entered and made a rule of this court: which two several appointments of arbitrators, or submission to arbitration, are in the words following; to wit [*copy of the appointments verbatim*]. Upon the motion of Mr. [ ] (*e*).

By the Court.

XCVIII.

Vice-Chancellor Knight Bruce.

Wednesday, the 17th day of November, 1847.

In the matter of the submission to arbitration of Benjamin Vallack Elliot, of Plymouth, in the County of Devon, Gentleman, and the South Devon Railway Company.

And in the matter of "The South Devon Railway Act, 1844," and of "The South Devon Railway Act Amendment and Branches, 1846," and of "The Lands Clauses Consolidation Act, 1845."

Order making a submission under the "Lands Clauses Consolidation Act" an order of Chancery.

Upon motion this day made unto this court by Mr. Palmer, of counsel for Benjamin Vallack Elliot, and upon producing a submission to arbitration, bearing date the 15th day of July, 1847, and signed by William Carr, secretary to the said South Devon Railway Company, as by affidavit appears; and a submission to arbitration, bearing date, Plymouth, August 21st, 1847, and signed by Benjamin Vallack Elliot, as by affidavit also appears; it was prayed that the said two several submissions to arbitration may be made an order of this court, and be observed and performed by all parties thereto, according to the tenor and true meaning thereof: which is ordered accordingly (*f*).

XCIX.

In Chancery.

In the matter of an arbitration between
J. H., S. B., & J. G. and the N. S.
Railway Company.

Special notice of motion to make a submission to

Take notice, that by special permission this day obtained from his Honor V. C. Knight Bruce, who has this day given leave to serve this notice of motion on or before Monday next, this court will be moved before his said Honor V. C. Knight Bruce, on Wednesday, the 26th day of January

(*e*) See P. 3, ch. 5, s. 3, p. 55, as to making a submission under the Lands Clauses Act a rule of court.

(*f*) Reg. Lib. A. 1847, fol. 70, E. D. C.

arbitration under the "Lands Clauses Consolidation Act" an order of Chancery.

next, by Mr. R., Mr. M., & Mr. H. H., on behalf of the N. S. Railway Company, that the submission to arbitration in this matter may be made a rule of this Honorable Court. And take notice that the following affidavits and documents, or such part thereof as counsel shall advise, will be read in support of the said motion; namely, the affidavit of W. K. filed in this matter on the third day of December last, together with the appointment of G. A. M'D. as arbitrator in the said reference (*g*), and the appointment of A. L. B. as umpire in the said reference, respectively referred to in the said affidavit; the affidavits of the said W. K. & J. F. S. both filed in this matter on the 8th day of December last, together with the award of the said A. L. B., referred to in the said last-mentioned affidavit; the affidavit of J. H. filed in this matter on the 21st day of December last; and the affidavit of G. Y. this day filed in this matter.

Dated the 22nd day of January, 1848.

K. and S.
Solicitors and agents for the Company.

To the above-named J. H., S. B., and J. G., all of L——, in the County of S——, coal masters and co-partners.

C.

Vice-Chancellor Knight Bruce.

Wednesday, the 26th day of January, 1848.

Order making a submission under the Lands Clauses Act an order of Chancery on one only of the two appointments of arbitrators.

In the matter of an arbitration between John Hawley, Sampson Bridgewood, and John Goodwin, and The North Staffordshire Railway Company (*h*).

Whereas, Mr. Russell, and Mr. Malins, and Mr. Hugh Hill, of counsel for the North Staffordshire Railway Company, this day moved and offered divers reasons unto this court that the submission to arbitration in this matter might be made a rule of this court; in the presence of Mr. Francis Simpkinson and Mr. Serjeant Allen, of counsel for the said John Hawley, Sampson Bridgwood, and John Goodwin: Whereupon, and upon hearing an appointment of arbitration made in pursuance of the provisions of the "North Staffordshire Railway (Pottery line) Act, 1846," and the "North Staffordshire Railway (Churnet Valley line) Act, 1846," and of "The Companies Clauses Consolidation Act, 1845," "The Lands Clauses Consolidation Act, 1845," and "The Railway Clauses Consolidation Act,

(*g*) The appointment of the arbitrator by the company. The appointment of the arbitrator by the landowners could not be procured, nor had the company a copy of it.

(*h*) The order ought to have been entitled in the matter of the statutes stating their titles, as well as in the matter of the arbitration, as in Form XCVIII.

1845," respectively incorporated therewith, bearing date the 30th day of August, 1847, and signed W. T. Copeland, John Ridgway, two of the directors of the said Company; an appointment of umpire, dated the 15th day of September, 1847, and signed G. A. M'Dermott, John Higginbottom; the writing of award bearing date the 29th day of November, 1847, under the hand and seal of A. L. Barton, and by him sealed and delivered in the presence of John Ferguson Smith; an affidavit of William Keary, sworn the 3rd day of December, 1847; another affidavit of William Keary, sworn the 8th day of December, 1847; an affidavit of John Ferguson Smith, sworn the 8th day of December, 1847; an affidavit of John Higginbottom, sworn the 21st day of December, 1847; another affidavit of the said William Keary, sworn the 12th day of January, 1848; an affidavit of George Young, sworn the 12th day of January, 1848; another affidavit, of the said William Keary, sworn the 15th day of January, 1848; an affidavit of John Harding Sheppard and Samuel Williamson, sworn the 15th day of January, 1848; an affidavit of George Haywood, sworn the 20th day of January, 1848; another affidavit of the said George Young, sworn the 22nd day of January, 1848; and a notice, in writing, served on the said John Hawley and others, giving notice that the said Company would, at the hearing of the said motion, read the several affidavits and documents therein and hereinbefore mentioned, dated the 24th day of January, 1848—read, and what was alleged by the counsel for the said North Staffordshire Railway Company, and for the said John Hawley and others:—This Court doth Order, that the said submission to arbitration be made an order of this court, to be observed and performed by all parties thereto, according to the tenor and true meaning thereof(*i*).

CI.

Master of the Rolls.

Wednesday, the [ ] day of [ ], in the [ ] year of the reign of her Majesty, Queen Victoria, 1848.

Between { A. B. plaintiff, and C. D. defendant.

Upon motion this day made unto this court by Mr. E., of counsel for the plaintiff, it was prayed that the writing of award, bearing date the [ ] day of [ ], under the respective hands and seals of X. Y. & U. V., Esquires, and by them sealed and delivered, being first duly stamped, in the presence of [ ], may be made an order of this court: Whereupon, and upon hearing Mr. F., of counsel for the defendant

Order making award order of Chancery by consent.

(*i*) Reg. Lib. A. 1847, fol. 380. E. D. C., Jun. See the case cited, p. 555.

who consented thereto:—This Court doth Order, that the said award be made an order of this court; and that the same be observed and performed by all parties thereto, according to the tenor and true meaning thereof (*k*).

CII.

Vice-Chancellor of England.

Tuesday, the [ ] day of [ ], in the [ ] year of the reign of her Majesty, Queen Victoria, 1848.

Order making award order of Chancery on affidavit of service of notice of motion.

In the matter of the arbitration between A. B. & C. D.

And in the matter of the statute the 9 & 10 W. III. c. 15, entitled "An Act for determining Differences by Arbitration."

Upon motion this day made unto this court by Mr. E., of counsel for the said A. B., it was prayed that the writing of award, bearing date the [ ] day of [ ], under the hand of X. Y., Esq., barrister-at-law, and by him signed and delivered to the said A. B. in the presence of [ ], may be made an order of this court: Whereupon, and upon hearing an affidavit of notice of this motion to the said A. B. read:—This Court doth Order, that the said award be made an order of this court; and that the same be observed and performed by all parties thereto, according to the tenor and true meaning thereof.

CIII.

[*Entitle the order as in Form* CI.]

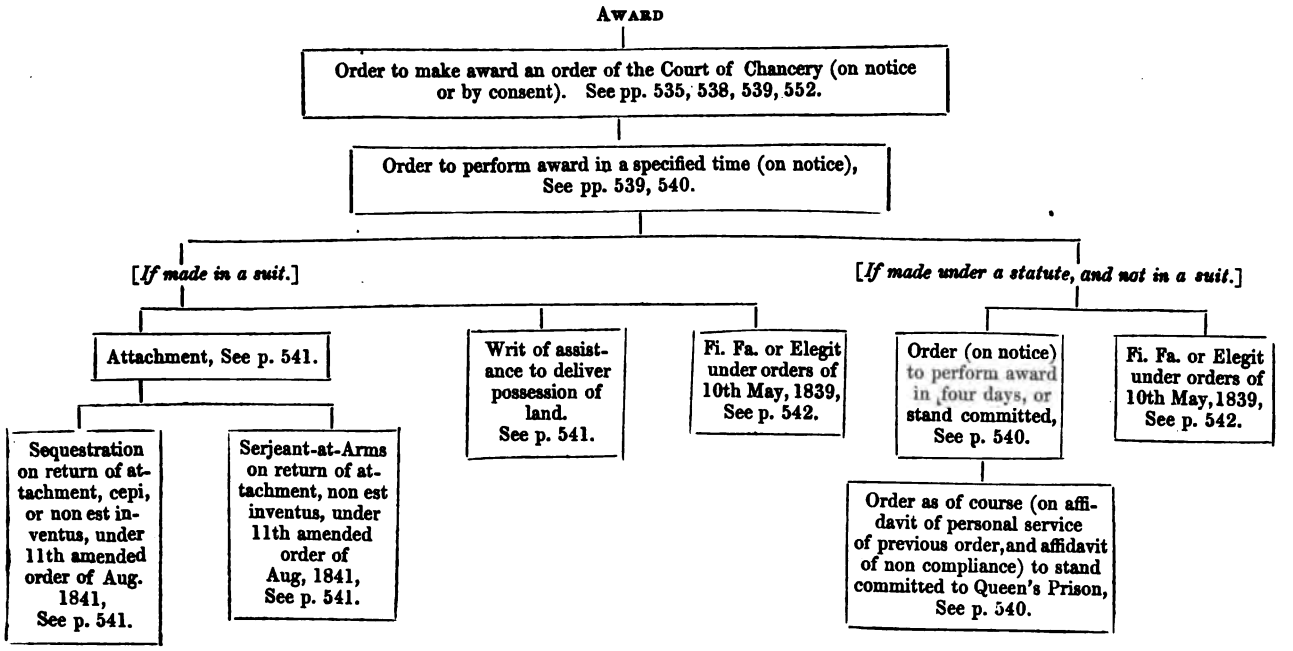
Order making award order of Chancery on motion opposed.

Whereas, Mr. E., of counsel for the plaintiff, this day moved, and offered divers reasons unto this court, that the writing of award, bearing date the [ ] day of [ ], under the hand of X. Y., of [ ], and by him signed and published in the presence of O. P., might be made an order of this court, in the presence of Mr. F., of counsel for the defendant; Whereupon, and upon hearing an affidavit of G. H., sworn the [ ] day of [ ], and an affidavit of I. K., sworn the [ ] day of [ ], read, and what was alleged by the counsel on both sides:—This Court doth Order, that the said award be made an order of this court; and that the same be observed and performed by all parties thereto, according to the tenor and true meaning thereof.

(*k*) This Form, or Forms CII. or CIII. must be used according to circumstances. In the cases of Stanley v. Blundell, V. C. E., 21st Dec. 1846; and Fradley v. Haslam, M. R., 19 Ap. 1847, the awards have been made orders on similar forms.

CIV.

Tabular Statement, showing the Modes of Enforcing an Award made an order of the Court of Chancery.



CV.

Affidavit of service of rule, allocatur and award, and demand of sum and costs awarded.

(*l*) [*Entitle the affidavit as an affidavit of execution of an award. Form* XC.] A. B. of [ ], one of the parties to the said arbitration maketh oath and saith, that the submission of this deponent, and the said C. D., to the award of X. Y., contained in a certain bond or obligation, bearing date the [ ] day of [ ], A. D. [ ], was on the [ ] day of [ ], A. D. [ ], made a rule of this court; and that he, this deponent, did personally serve the said C. D. with a true copy of the said rule, and of the Master's allocatur given for costs, taxed pursuant to the said award, and also with a true copy of the award of the said X. Y. hereto annexed; and at the same time showed the said C. D. the said original rule, allocatur and award, and demanded of him the payment of the sum of £ [ ], awarded to this deponent by the said award; and also the sum of £ [ ], allowed by the Master for costs, pursuant to the said award: but the said C. D. did not then, or at any time afterwards, pay the said sums, or either of them, or any part of either of them to this deponent, or to any person on his behalf; and both the said sums now remain wholly due and owing to this deponent.

Notice of enlargement.

And this deponent further saith, that at the time of making the demand of the said sums, the said C. D. had notice, and this deponent then gave him notice, that the time for making the said award had been duly enlarged, and that the said award had been made and published within the said enlarged time (*m*).

CVI.

Power of attorney to demand money and costs awarded.

Know all men by these presents, that I, A. B. of [ ], for divers good causes and considerations me hereunto moving, have made, ordained, authorized, constituted, and appointed, and by these presents do make, ordain, authorize, constitute, and appoint E. F. of [ ] gentleman, my true and lawful attorney, for me, and in my name, and to my use, to ask, demand, and receive, of and from C. D. of [ ] the sum of £ [ ], awarded to be paid to me by the award of

(*l*) See P. 3, ch. 6, s. 3, d. 1, p. 573, as to entitling affidavits for an attachment.

(*m*) See P. 3, ch. 6, s. 2, p. 567, as to the proceedings for an attachment. P. 3, ch. 7, s. 2, p. 595, as to the proceedings for a rule to pay the sum awarded.

X. Y., dated the [ ] day of [ ], A. D. [ ]; and also the sum of £ [ ] for costs, allowed to me by the allocatur of the Master, pursuant to the said award, and under and by virtue of a rule of her Majesty's Court of Queen's Bench at Westminster, bearing date the [ ] day of [ ], A. D. [ ]: and on payment thereof, acquittances, or other sufficient discharges for the same, for me, and in my name, to make, seal, and deliver, and to do all other lawful acts and things whatsoever concerning the premises, as fully in every respect as I myself might or could do, if I were personally present. And I hereby ratify, confirm, and allow all and whatsoever my said attorney shall in my name lawfully do, in and about the said premises, by virtue of these presents. In witness whereof I have hereunto set my hand and seal this [ ] day of [ ], A. D. [ ] (*n*).

A. B. (L. S.)

Sealed, signed, and delivered, in the presence of O. P.

CVII.

In the Queen's Bench.

Monday, the [ ] day of [ ], 1848, in the 11th year of Queen Victoria.

Rule nisi for an attachment for non-payment of money and costs awarded.

"In the matter of the arbitration between A. B. and C. D." [*or if the reference be in a cause* "A. B. v. C. D."]

Upon reading the rule made in this "matter" [*or* "cause"] on the [*the date of the rule making the agreement or order of reference a rule of court*], and the allocatur of E. F., one of the Masters of this court thereon, the affidavit of G. H. [*verifying the award*], and the award thereto annexed, the affidavit of I. K., and the affidavit of L. M. [*stating the facts necessary to bring the party into contempt*]:—It is ordered, that "C. D., in the said rule, award, and affidavits named," [*or* "the defendant,"] upon notice of this rule to be given to him, shall upon [*the day when cause is to be shown*] show cause why a writ of attachment should not issue against him for his contempt in not paying the several sums of £ [*sum awarded*] and £ [*amount of costs taxed*], pursuant to the said rule, the said Master's allocatur, and the said award. Upon the motion of Mr. [ ]. (*o*)

By the Court.

(*n*) See P. 3, ch. 6, s. 2, p. 568, as to the necessary demand for an attachment.

(*o*) See P. 3, ch. 6, s. 3, d. 2, p. 577, as to the rule nisi for an attachment.

CVIII.

Rule absolute for an attachment for non-payment of money and costs awarded.

In the Queen's Bench.

Friday, the [ ] day of [ ], 1848 in the 11th year of Queen Victoria.

"In the matter of the arbitration between A. B. and C. D." [*or if in a cause* "A. B. v. C. D."]

Upon reading the rule made in this "matter," [*or* "cause,"] on [*date of the rule nisi*], the affidavit of N. O. and the affidavit of P. Q. [*the affidavits in answer*], and upon hearing Mr. A. of counsel for "the said A. B. in the said rule named," [*or* "the plaintiff,"] and Mr. B. of counsel for "the said C. D. in the said rule also named," [*or* "the defendant,"] It is ordered, that a writ of attachment issue against "the said C. D." [*or* "the defendant,"] for his contempt in not paying the several sums of £ [*sum awarded as in the rule nisi*], and £ [*taxed costs as in the rule nisi*], pursuant to the rule made in this "matter" [*or* "cause"] on [*date of the rule making the order or agreement of reference a rule of court*] and the allocatur of E. F., one of the Masters of this court thereon, and the award made between the parties (*p*).

By the Court.

CIX.

Rule absolute for an attachment, no cause being shown.

In the Queen's Bench.

Friday, the [ ] day of [ ], 1848, in the 11th year of Queen Victoria.

"In the matter of the arbitration between A. B. and C. D." [*or if in a cause* "A. B. v. C. D."]

Upon reading the rule made in this "matter," [*or* "cause,"] on [*date of the rule nisi*], and the affidavit of S. T., [*affidavit of service of the rule nisi,*] and no cause being shown to the contrary:—It is ordered [*continue as in the preceding Form to the end, adding at the conclusion the words,* "Upon the motion of Mr. [ ]"].

By the Court.

CX.

Rule adjudging party attached in contempt and committing him.

In the Common Pleas.

Upon reading, &c., the said H. W. H. (now present here in court) is by the court here adjudged in contempt:—It is therefore ordered, that the

(*p*) See P. 3, ch. 6, s. 3, d. 4, p. 582, as to the rule absolute for an attachment.

said H, W. H. be committed to the custody of the keeper of the Queen's Bench Prison for the contempt aforesaid; and it is further ordered, that the said keeper, or his deputy, do bring the said H. W. H. to the bar of this court on the 25th day of November instant, then and there to receive the judgment of this court for his said contempt (*q*).

CXI.

Rule directing imprisonment of party attached adjudged in contempt.

In the Common Pleas.

Upon reading, &c., the said H. W. H. (now present here in court) being brought to the bar of the court by the keeper of the Queen's Prison, in pursuance of the last-mentioned rule, is by the court here adjudged in contempt:—It is thereupon ordered that the said H. W. H., for the contempt aforesaid, be imprisoned in the custody of the keeper of the Queen's Prison, for the space of two years from the date hereof, and that the said H. W. H. be remanded to the custody of the said keeper, to be by him kept in safe custody in execution of this judgment (*r*).

CXII.

Rule nisi to pay money and costs pursuant to award.

[*This Form is the same as Form CVII. for the rule nisi for an attachment, except that instead of the words between* "show cause why" *and* "the several sums," *there is to be substituted the following*]—he should not pay "to the said A. B. in the said rule, award, and affidavits named," [*or* "to the plaintiff"]; [*and there is to be added just before the words,* "upon motion,"] and why he should not pay the costs of this application, to be taxed by one of the Masters (*s*).

CXIII.

Rule absolute for payment of money and costs awarded.

[*This Form is the same as the rule absolute for an attachment, Forms CVIII. CIX., except that for the words between* "it is ordered that," *and* "the several sums," *there are to be substituted the words*]—"the said C. D." [*or* "the defendant"] do pay to "the said A. B." [*or* "the plaintiff"]; [*and there is to be added the clause*]—and it is further ordered

(*q*) See R. v. Hemsworth, 3 C. B. 745. P. 3, ch. 6, s. 3, d. 5, p. 586, as to proceedings on the attachment.

(*r*) See R. v. Hemsworth, 3 C. B. 745. P. 3, ch. 6, s. 3, d. 5, p. 587, as to proceedings on the attachment.

(*s*) See P. 3, ch. 7, s. 2, p. 596, as to the rule nisi to pay money awarded.

that it be referred to one of the Masters to tax the costs of this application; which costs, when taxed, shall be paid by "the said C. D." [*or* "the defendant,"] to "the said A. B.," [*or* "the plaintiff,"] his attorney, or agent (*t*).

CXIV.

Rule to allow motion to set aside award, and to draw up rule embodying order of reference nunc pro tunc.

In the Queen's Bench.

Upon, &c. &c. It is ordered that the plaintiff be at liberty to move during the present term to set aside the award in this cause; and in the event of this court granting a rule, that the same may be drawn up and bear date as of Wednesday, the 7th day of May in Easter Term last past. And it is further ordered, that the defendants, or their attorney, do make the order of reference in this cause a rule of court, and that the same bear date as of the last-mentioned day (*u*).

CXV.

Rule nisi for setting aside an award.

In the Queen's Bench.

Monday, the [ ] day of [ ], 1848, in the 11th year of Queen Victoria.

[*When the reference is not in a cause entitle it*] In the matter of the arbitration between A. B. and C. D. [*When the reference is in a cause, head the rule merely*] A. B. v. C. D.

Upon reading the rule made in this "matter" [*or* "cause"] on [*date of the rule making the agreement or order of reference a rule of court*], the affidavit of E. F. [*verifying the award or copy*], and "the award" [*or* "the copy of the award"] "thereunto annexed," [*or* "therein mentioned,"] the affidavit of G. H., and the affidavit of I. K. [*affidavits as to facts, if any*]: It is ordered, that "C. D., in the said rule, award, and affidavits mentioned," [*or* "the defendant,"] upon notice of this rule to be given to him or his attorney, shall upon [*day when cause is to be shown*] show cause why the award made between the parties should not be set aside on the following grounds:—First, [*here state the grounds specifically*]: and that in the meantime proceedings be stayed. Upon the motion of Mr. [ ] (*x*).

By the Court.

(*t*) See P. 3, ch. 7, s. 2, p. 597, as to the rule absolute to pay money awarded.

(*u*) See Bottomley v. Buckley, 4 D. & L. 157.

(*x*) See P. 3, ch. 9, s. 5, p. 645, as to the rule nisi to set aside an award.

CXVI.

In the Queen's Bench.

Thursday, the [ ] day of [ ], 1848, in the 11th year of Queen Victoria.

Rule absolute for setting aside an award.

"In the matter of the arbitration between A. B. and C. D." [*or when the reference is in a cause* "A. B. v. C. D."]

Upon reading the rule made in this "matter," [*or* "cause,"] on [*date of the rule nisi*] the affidavit of L. M. and the affidavit of N. O., [*the affidavits in answer, if any,*] and upon hearing Mr. [ ] of counsel for "C. D. in the said rule named," [*or* "the defendant,"] and Mr. [ ] of counsel for "A. B. in the said rule also named," [*or* "the plaintiff,"]:—It is ordered that the award made between the parties be set aside (*y*).

By the Court.

CXVII.

[*Entitle this rule as in the preceding Form.*]

Rule absolute for setting aside an award, no cause being shown.

Upon reading the rule made in this "matter," [*or* "cause,"] on [*date of the rule nisi*], the affidavit of Q. R., [*affidavit of service of rule nisi*], and no cause being shown to the contrary:—It is ordered that the award made between the parties be set aside. Upon the motion of Mr. [ ].

By the Court.

CXVIII.

Rule referring award back to arbitrator for amendment.

[*Commence as in Form CVIII.*]—It is ordered, that "the matters of the said award [*or some special matter*] be referred back to the said arbitrator for his reconsideration and determination [*if the award needs amending, say instead* "that the award of the arbitrator in the said rule mentioned be referred back to the said arbitrator, to reconsider and amend the same if he shall think fit"] (*z*).

CXIX.

In Chancery.

Notice of motion to set aside award in Chancery.

[In the matter of an arbitration between
J. H., S. B., and J. G., and the N. S. Railway Company.

Take notice, that this Honorable Court will be moved before his Honor

(*y*) See P. 3, ch. 9, s. 7, p. 655, as to the rule absolute to set aside an award.

(*z*) See P. 3, ch. 9, s. 8, p. 658, as to referring the award back.

Vice-Chancellor Knight Bruce, on Wednesday, the 23rd day of December instant, or so soon after as counsel can be heard, by Mr. R. and Mr. M. on behalf of the N. S. Railway Company, that the award made by Mr. A. L. B., and dated the twenty-ninth day of November now last past, may be set aside. And take notice, that the said N. S. Railway Company will, in support of such motion, read the following affidavits filed in this matter, namely, the affidavit of W. K., sworn on the third day of December instant, and filed on the same day; the affidavit of C. F., sworn on the fourth day of December instant; the affidavits of G. A. M'D., J. H. S., S. W., and H. W., all sworn on the sixth day of December instant; another affidavit of the said G. A. M'D., and also another affidavit of the said J. H. S., both sworn on the seventh day of December instant; another affidavit of the said W. K., and the affidavit of J. F. S., both sworn on the eighth day of December instant; all which said affidavits, with the exception of the first-mentioned affidavit of the said W. K., were respectively filed on the said 8th day of December instant.

Dated this seventeenth day of December, 1847.

Yours, &c.

K. & S.

Solicitors to the N. S. Railway Company.

To the above J. H., S. B., and J. G.

CXX.

Order nisi to set aside award under the Lands Clauses Act.

Vice-Chancellor Knight Bruce.

Wednesday, the 24th day of November, 1847.

In the matter of the submissions to arbitration of Benjamin Vallack Elliot, of Plymouth, in the County of Devon, Gentleman, and the South Devon Railway Company.

And in the matter of "The South Devon Railway Act, 1844," and of "The South Devon Railway Act Amendment and Branches, 1846;" and of "The Lands Clauses Consolidation Act, 1845."

Upon motion this day made unto this court by Mr. Roundell Palmer, of counsel for the above-named Benjamin Vallack Elliot, it was alleged, that by an order made in these matters, dated the 17th day of November, 1847, it was, upon the production of a submission to arbitration, bearing date the 15th day of July, 1847, and signed by William Carr, secretary to the South Devon Railway Company, as by affidavit appeared, and a submission to arbitration, bearing date Plymouth, August 21st, 1847, and signed by Benjamin Vallack Elliot, as by affidavit also appeared, Ordered, that the said two several submissions should be made an order of this court, and be observed and performed by all parties thereto, according to the tenor and true meaning thereof: that Edward Driver and Robert Dy-

mond were the arbitrators named in such submissions, who appointed James Marmont the umpire, pursuant to the act of parliament in that case made and provided: that the said James Marmont made his award in writing, bearing date the 23rd day of September, 1847: that the said Benjamin Vallack Elliot is advised that the same ought to be set aside on the following grounds(*a*):—First, that the arbitrators and umpire respectively are not indifferent and disinterested persons with respect to the subject of the award; secondly, that the proceedings of the said arbitrators and umpire were irregular in respect of the matters stated in the affidavits hereinafter mentioned: and thirdly, that the said award is inconsistent with a certain memorandum in writing under the hands of the said arbitrators and umpire, delivered by them together with the said award, and bearing even date therewith, and is thereby shown to be erroneous. It was therefore prayed that the said South Devon Railway Company may, on the 20th day of January next, show cause why the said award should not be set aside: Whereupon, and upon hearing the said order, the said award, and the copy memorandum annexed thereto, an affidavit of the said Benjamin Vallack Elliot, and an affidavit of John Kelly, read, and what was alleged by the counsel for the said Benjamin Vallack Elliot:—This Court doth Order, that the said award be set aside, unless the said South Devon Railway Company do, on or before the 27th day of January next, show unto this court good cause to the contrary (*b*).

(*a*) The registrar had some doubts as to stating the grounds on the face of the order, but they were inserted at the particular request of the parties.

(*b*) Reg. Lib. A. 1847, fol. 335, F. R. B. See P. 3, ch. 11, s. 3, p. 679, where the circumstances under which this order was made are stated.

APPENDIX OF STATUTES

RELATING TO ARBITRATION.

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1 James I. c. 10.

1 James I. c. 10.

An Act for the better execution of justice.

Nothing shall be taken for the report of a cause referred by any court.

Forasmuch as all exactions, extortions, and corruptions are odious, and prohibited in all well-governed commonwealths, Be it enacted, that no person to whom any order or cause shall be committed or referred, by any of the king's judges, or courts at Westminster, or any other court, shall directly or indirectly, or by any art, shift, colour, or device, have, take, or receive, any money, fee, reward, covenant, obligation, promise, agreement or any other thing for his report or certificate, by writing or otherwise; upon pain of the forfeiture of one hundred pounds for every such report or certificate, and to be deprived of his office and place in the same court; the one moiety of the said forfeitures to be to our Sovereign Lord the King, his heirs and successors, the other moiety to the party grieved, which will sue for the same, at any time during the said suit, or within one year after the same cause discontinued or decreed; and in his default of such suit, to him or them that will sue for the same, by original writ, bill, plaint, or information, in his Majesty's High Court of Star-Chamber, or in any of his Majesty's courts of record at Westminster; in which suit by writ, bill, plaint, or information, no wager of law, essoin, privilege, supersedeas, protection, or any other delay, shall be suffered or admitted.

The clerks' fees for writing a report.

S. 2. Provided nevertheless, that it shall be lawful for the clerk to take for his pains for writing of every such report or certificate, twelve pence for the first side, and two pence for every side after, and no more, upon pain to forfeit ten shillings for every penny taken over and above the said sum, to be had and recovered as aforesaid.

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9 & 10 Will. III. c. 15.

9 & 10 Will. III. c. 15.

An Act for determining differences by arbitration.

S. 1. Whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission: now for promoting trade, and rendering the award of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in parliament assembled, and by authority of the same:—that from and after the 11th day of May, which shall be in the year of our Lord, 1698,

Merchants and traders, &c.

it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action, or suit in equity, by arbitration; to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record, which the parties shall choose; and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court: and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission: and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court: and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution by any order, rule, command, or process, of any other court either of law or equity; unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption, or other undue means.

9 & 10 Will. III. c. 15.

desiring to end controversies by arbitration may agree their submission of the suit to the award of any person.

Agreement so made to be inserted in their submission, &c.

Parties to be finally concluded by such arbitration.

In case of disobedience party neglecting subject to penalty, &c.

S. 2. And be it further enacted, by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity; so as complaint of such corruption or undue practice be made in the court, where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this act contained to the contrary notwithstanding.

Unless arbitrators misbehaved themselves.

Corrupt arbitration void, and may be set aside, &c.

ACTS CONCERNING THE EXPENSES OF PRISONERS.

5 Geo. IV. c. 85.

5 Geo. IV. c. 85.

An Act for amending an Act of the last session of parliament, relating to the building, repairing, and enlarging of certain Gaols and Houses of Correction; and for procuring information as to the state of all other Gaols and Houses of Correction in England and Wales.

[21*st June*, 1824.]

[*By s.* 1, *parties having charge of gaols for cities, &c., may contract with justices having charge of county gaols for care of prisoners.*]

S. 2. And be it further enacted, that the monies to be paid under any such contract as aforesaid, shall be raised in the same manner as monies for defraying the expenses of the gaol or house of correction, for which a substitute shall be provided under such contract: and where such expenses are not wholly defrayed from the same fund, and there shall arise a difference of opinion between the parties interested in the several funds applicable to the several purposes of the prison, as to the proportion in which those funds respectively shall contribute to the sum to be paid to the county, riding, or division, for the use of its prison, and such difference shall not be adjusted by agreement between themselves; it shall

Expenses under contract, how raised.

In case of dispute, to be settled by arbitration.

5 GEO. IV. c. 85.

be lawful for either of such parties to apply to the justices of assize of the last preceding circuit, or of the next succeeding circuit, or to one of such justices, who shall, by writing under their or his hands or hand, nominate a barrister-at-law, not having any interest in the question, to arbitrate between the parties; and such arbitrator may, if he shall see fit, adjourn the hearing from time to time, and require all such further information to be afforded, by either of the parties, as shall appear to him meet and necessary; and shall, by his award in writing, determine the proportions in which such parties shall contribute towards the said expenses; and his award shall be final and conclusive between the parties: and such arbitrator shall also assess the costs of the arbitration, and shall direct by whom, and out of what fund, the same shall be paid.

Powers of arbitrator.

Award final.

Costs.

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5 & 6 WILL. IV. c. 76.

5 & 6 WILL. IV. c. 76.

An Act to provide for the Regulation of Municipal Corporations in England and Wales. [*9th Sept.* 1835.]

Treasurers of counties to keep an account of expenses of prosecution of offenders, &c.

S. 114. And be it enacted, that the treasurer of every county in England and Wales shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport, of all offenders committed for trial to the assizes in such county from any borough, in which a separate court of Quarter Sessions of the peace shall be holden: and the treasurer of every such county shall, not more than twice in every year, send a copy of the said account to the council of each of the said boroughs, and shall make an order for payment of the same on the council of such borough; and the council of every such borough shall forthwith order the same, with all reasonable charges of making and sending such account, to be paid to the treasurer of such county out of the borough fund: and in case any difference shall arise concerning the said account, it shall be decided by the arbitration of a barrister to be named, as is provided in the case of differences with respect to the payment of monies under contracts, made by authority of an act made in the fifth year of his late Majesty King George the Fourth, intituled "An Act for amending an Act of the last Session of Parliament, relating to the Building, Repairing, and Enlarging of certain Gaols and Houses of Correction, and for procuring information as to the states of all other Gaols and Houses of Correction in England and Wales," &c. &c.

In case of difference respecting such account, the same to be referred to arbitration, as provided in 5 Geo. IV. c. 85.

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5 & 6 VICT. c. 98.

5 & 6 VICT. c. 98.

An Act to amend the Laws concerning Prisons. [*10th Aug.* 1842.]

Expenses of conveyance and maintenance of such prisoners, how to be paid.

S. 20. And be it enacted, that the expense heretofore incurred, or hereafter to be incurred, in the conveyance, transport, maintenance, safe custody, and care of such prisoners [*prisoners from a borough with a separate court of Quarter Sessions, kept in county prison, not under contract*] as aforesaid, shall be paid out of a rate to be made and levied for that purpose by the council of such borough, in the nature of a borough rate; and any such rate may be made and recovered in the same manner as any borough rate may be made or recovered; and the amount of all such expenses of conveyance, transport, maintenance, safe custody, and care of prisoners as aforesaid, shall, in case of dispute, be settled by such barrister-at-law as shall be determined upon in writing between the visiting justices of such prison and the council of such borough; and in case no appointment of such barrister be agreed upon by the said parties within the space of fourteen days next after such dispute shall have arisen, such dispute shall be decided by the arbitration of a barrister, to be named, as provided in the case of differ-

ences with respect to the payment of monies under contracts, made by authority of an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act for amending an Act of the last Session of Parliament, relating to the Building and Enlarging of certain Gaols and Houses of Correction, and for procuring information as to the state of all other Gaols and Houses of Correction in England and Wales." 5 & 6 Vict. c. 98.

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7 & 8 Vict. c. 93.

7 & 8 Vict. c. 93.

An Act to enable Barristers appointed to arbitrate between Counties and Boroughs to submit a Special Case to the Superior Courts.

[*9th August*, 1844.]

Whereas by an act passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," and by another act passed in the sixth year of the reign of her Majesty, intituled "An Act to amend the Law concerning Prisons," provision was made for the appointment of barristers-at-law to arbitrate in cases of difference concerning certain accounts, and the amounts of certain expenses therein mentioned: and whereas it is expedient that the treasurer of the county, the visiting justices of the prison, and the council of the borough, or any of them, affected by any award which may be made by any barrister under the authority of either of the said acts, should be enabled to obtain in a summary way the opinion of one of the superior courts of common law at Westminster, upon any point of law arising out of any of the matters referred to such barrister: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that in any case in which a barrister-at-law shall have been, or shall hereafter be named, as in the said recited acts, or either of them, is mentioned, to arbitrate between the parties, such barrister-at-law, upon the requisition in writing of the treasurer of the county, or of the visiting justices of the prison, or of the town clerk of the borough, on behalf of the council of the borough, who shall be interested in the decision of such barrister, shall be empowered, if he shall think fit, before making his award, to state one or more special case or cases touching any of the matters referred to such barrister-at-law for the opinion of such one of the superior courts of common law at Westminster as he shall direct, or to raise in any award to be at any time made by him any question or questions for the opinion of such court; and such court shall hear and determine the matter according to the practice of the court upon special cases, and make such order as to the costs, and by and to whom, and in what manner, the same shall be paid or borne, as to such court shall seem meet, and the decision of the court shall be binding on such barrister in making his award. 5 & 6 W. 4, c. 76. 5 & 6 Vict. c. 98.

Arbitrating barrister, upon receiving a requisition in writing from treasurer of the county, or visiting justices of the prison, &c. may state a special case, touching any matter referred to him, for the opinion of a superior court.

S. 2. And be it declared and enacted, that in case any barrister who shall have been, or shall hereafter be named, in pursuance of the said recited acts, or either of them, or of this act, shall die, or refuse to act, or be disabled from acting, either from ceasing to practise as a barrister, or for any other reason, before making his award, the several parties in the said several acts mentioned, shall be authorized and required to name another barrister-at-law for all the purposes in the said several acts mentioned, or any of them, in like manner as if no appointment had been made under the same; and the barrister so newly named shall have the same authority to decide the matters in difference as if no other appointment had been made; and in every such case in which, before the passing of this act, a second barrister has been appointed to settle or determine any matters in difference, left unsettled or undetermined by the barrister first appointed for that purpose, the appointment of such second barrister shall be deemed

In case barrister die before making his award, another one to be chosen.

7 & 8 Vict. c. 93.

good, and the barrister so secondly appointed shall be deemed to have, and to have had, from his appointment the same authority as if appointed under this act.

ACTS CONCERNING MASTERS AND WORKMEN.

2 Geo. IV. c. 96.

5 Geo. IV. c. 96.

An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen. [21*st June*, 1824.]

Whereas it is expedient that the laws relative to the arbitration of disputes between Masters and Workmen should be consolidated and amended, and one general law made applicable to every description of trade and manufacture; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, so much of a certain act passed in the parliament of Ireland,

3 G. 2 (I.) in part.

in the third year of King George the Second, intituled "An Act to prevent unlawful Combinations of Workmen, Artificers, and Labourers employed in the several Trades and Manufactures of this Kingdom, and for the better Payment of their Wages; as also to prevent Abuses in making of Bricks, and to ascertain their Dimensions," as relates to the decision of disputes as therein mentioned; also a certain other act passed in the thirty-ninth and fortieth years of King

39 & 40 G. 3, c. 90.

George the Third, intituled, "An Act for settling Disputes that may arise between Masters and Workmen engaged in the Cotton Manufacture in that Part of Great Britain called England;" also a certain other act passed in the thirty-

39 & 40 G. 3, c. 106.

ninth and fortieth years of King George the Third, intituled "An Act to repeal an Act passed in the last Session of Parliament, intituled 'An Act to prevent unlawful Combinations of Workmen,' and to substitute other Provisions in lieu thereof;" also a certain other act passed in the forty-first year of King George

41 G. 3, c. 38.

the Third, intituled "An Act to amend so much of an Act passed in the Thirty-ninth and Fortieth Years of the Reign of His present Majesty, intituled 'An Act to repeal an Act passed in the last Session of Parliament, intituled 'An Act to prevent unlawful Combinations of Workmen,' and to substitute other Provisions in lieu thereof,' as relates to the Forms of Convictions therein referred to;" also a certain other act passed in the forty-third year of King George the Third, in-

43 G. 3, c. 151.

tituled "An Act for preventing and settling Disputes which may arise between Masters and Weavers engaged in the Cotton Manufacture in Scotland, and Persons employed by such weavers, and persons engaged in ornamenting Cotton

44 G. 3, c. 87.

Goods by the Needle;" also a certain other act passed in the forty-fourth year of King George the Third, intituled "An Act to amend an Act passed in the Thirty-ninth and Fortieth Years of His present Majesty, intituled 'An Act for settling Disputes that may arise between Masters and Workmen engaged in

53 G. 3, c. 75.

the Cotton Manufacture in that part of Great Britain called England;'" and also a certain other act passed in the fifty-third year of King George the Third,

repealed.

intituled "An Act for the better regulation of the Cotton Trade in Ireland," shall be and the same are hereby repealed; save and except in as far as the same may have repealed any prior acts or enactments.

Enumeration of the Causes of Dispute that may be referred.

S. 2. And be it further enacted, That the following subjects of dispute arising between masters and workmen, or between workmen and those employed by them, in any trade or manufacture in any part of *Great Britain* and *Ireland*, may be settled and adjusted in manner hereafter mentioned; that is to say, disagreements respecting the price to be paid for work done, or in the course of being done, whether such disputes shall happen or arise between them respecting

the payment of wages as agreed upon, or the hours of work as agreed upon, or any injury or damage done or alleged to have been done to the work, or respecting any delay or supposed delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or to bad materials; cases where the workmen are to be employed to work any new pattern which shall require them to purchase any new implements of manufacture, or to make any alteration upon the old implements for the working thereof, and the masters and workmen cannot agree upon the compensation to be made to such workmen for or in respect thereof; disputes respecting the length, breadth, or quality of pieces of goods, or, in the case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof; disputes respecting the wages or compensation to be paid for pieces of goods that are made of any great or extraordinary length; disputes in the cotton manufacture respecting the manufacture of cravats, shawls, policat, romal, and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs; disputes arising out of, for, or touching the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted and settled; disputes between masters and persons engaged in sizing or ornamenting goods; but nothing in this act contained shall authorize any justice or justices acting as hereinafter mentioned to establish a rate of wages or price of labour or workmanship at which the workmen shall in future be paid, unless with the mutual consent of both master and workman: Provided always, that all complaints by any workman as to bad materials shall be made within three weeks of his receiving the same; and all complaints arising from any other cause shall be made within six days after such cause of complaint shall arise.

Limitation of time for workmen to lodge their complaints.

S. 3. And be it further enacted, That whenever such subjects of dispute shall arise as aforesaid, it shall be lawful for the master and workman, or either of them, to demand and have an arbitration or reference thereof in manner following; that is to say, where the party complaining and the party complained of shall come before or agree by any writing under their hands to abide by the determination of any justice of the peace or magistrate of any county, riding, division, stewartry, barony, city, burgh, town, or place within which the parties reside, it shall and may be lawful for such justice of the peace or magistrate to hear and finally determine, in a summary manner, the matter in dispute between such parties; but if such parties shall not come before or so agree to abide by the determination of such justice of the peace or magistrate, then it shall be lawful for any such justice or magistrate, and such justice of the peace or magistrate is hereby required, on complaint made before him, and proof by the examination of the party making such complaint, that application has been made to the persons or persons against whom such cause of complaint has arisen, or his, her, or their agent or agents, if such dispute has arisen with such agent or agents, to settle such dispute, and that the same has not been settled upon such complaint being made, or where the dispute relates to a bad warp, that such cause of complaint has not been done away with within forty-eight hours after such application, to summon before him such person or persons, or agent or agents, on some day not exceeding three days, exclusive of Sunday, after the making such complaint, giving notice to the person making such complaint of the time and place appointed in such summons for the attendance of such person or persons, agent or agents as aforesaid; and if at such time and place the person or persons so summoned shall not appear by himself, herself, or themselves, or send some person on his, her, or their behalf, to settle such dispute, or appearing shall not do away such cause of complaint, then and in such case it shall be lawful for such justice, and he is hereby required, at the request of either of such parties, to nominate arbitrators or referees for settling the matters in dispute; and such justice shall then and there at such meeting propose not less than four nor more than six persons, one half of whom shall be master manufacturers, or agents or foremen of some master manufacturer, and the other half of whom shall be workmen in such manufacture; such respective persons residing in or near to the place where such disputes shall have arisen; out of which master manufac-

Appointment of referees.

turers, agents, or foremen, the master engaged in such dispute, or his agent, shall choose one, and out of which workmen so proposed the workman or his agent shall choose another, who shall have full power to hear and finally determine such dispute.

Appointment of other referees where those appointed refuse or delay to accept the reference, or, accepting, do not act therein.

S. 4. And be it further enacted, That in case any or either of the persons so proposed by any such justice shall refuse or delay to accept such arbitration, or accepting shall not act therein, within two days after such nomination, the justice shall proceed to name another or other persons of the descriptions aforesaid, in the room of the person so refusing as aforesaid to be arbitrator or arbitrators in the place of any such arbitrator or arbitrators so refusing or delaying to accept, or who shall not act; and in every case of a second nomination the arbitrators shall meet within twenty-four hours after the application for the same, and at the same place at which the meeting of the referees first named was appointed, or at some other convenient place, as the justice may appoint; and the expense of every such application for the appointment of a second referee shall be borne and defrayed by the party through whose default, or the default of whose referee, such application is rendered necessary; and the justice making such second appointment shall certify the same in the form for that purpose hereafter set forth, or in some other form to the like effect; and in every case where a second arbitrator shall be appointed as aforesaid, and such second arbitrator shall not attend at the same time and place appointed for settling the matters in dispute, it shall be lawful for the other arbitrator, at such time and place, to proceed by himself to the hearing and determining of the same matters in dispute; and in such case the award of such sole arbitrator shall be final and conclusive as to all matters in dispute submitted to such arbitrator, without being subject to review, appeal, or suspension.

Meeting of referees, notice of which shall be given.

S. 5. And be it further enacted, That the arbitrators or referees being so nominated as aforesaid, the said justice shall thereupon appoint a place of meeting according to the directions of this act, and also a day for the meeting, notice of which nomination, and of the day of meeting, shall thereupon be given by such justice to the persons so nominated arbitrators or referees, and to any party to any such dispute, who may not have attended the meeting before such justice as aforesaid; which appointment shall be by such justice certified in the form following, or in some other form to the like effect; that is to say,

Form of justice's order, certifying nomination of referees.

"I, A. B., one of the justices of the peace acting for , do hereby certify, That C. D. and E. F. are duly nominated referees to settle the matters in difference between G. H. of master manufacturer, [*or* agent *or* foreman, *as the case may be*,] and I. K. of weaver, [*or otherwise, as the case may be*,] pursuant to an act passed in the fifth year of the reign of his present Majesty; and that the said referees are hereby directed to meet at on the day of at of the clock in the forenoon [*or* afternoon, *as the case may be*].

"A. B."

"I, A. B., one of the justices of the peace acting for , do hereby certify, That the above-named C. D. and E. F. [*or* one of them, *as the case may be*], having refused or delayed to act in the above-mentioned reference, L. M. and N. O. [*or* L. M. *only*, *as the case may be*], are [*or* is] by me duly nominated referees [*or* referee], together with the above-named C. D. [*or* E. F.] to settle the matters in difference between the above-named G. H. and I. K.; and the said C. D. or E. F. together with the said L. M. [*or* the said I. M. or N. O., *as the case may be*], are directed to meet at the place above-mentioned, on the day of in the year of our Lord at of the clock in the forenoon [*or* afternoon, *as the case may be*].

"A. B."

And the persons so appointed as aforesaid shall hear and examine the parties

and their witnesses, and determine such dispute within two days after such nomination, exclusive of Sundays, and the determination of such arbitrators shall be final and conclusive.

Place for the meeting of referees.

S. 6. And be it further enacted, That in all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting of the referees shall be at or as near as may be to the place where the work shall be carrying on, and in all other cases at or as near as may be to the place or places where the work has been given out.

Attendance of parties.

S. 7. Provided also, and be it further enacted, That if any person so complaining as aforesaid shall not attend, or send some person on his or her behalf, at the time and place appointed by such justice of the peace, for the purpose of naming such persons as aforesaid, such person shall not in such case be entitled to the benefit of this act; and if any person against whom any such complaint shall have been made as aforesaid shall not attend, or send some person on his or her behalf, the justice of the peace shall thereupon nominate a person for him out of such persons so proposed as aforesaid.

Investigation of the complaint.

S. 8. And be it further enacted, That the said arbitrators and referees shall meet at the time and place fixed by the justice of the peace by whom such referees were appointed, and shall, by inspection of the work in regard to which the dispute may have arisen, by hearing and examining the parties, or any other persons on their behalf, or that attend to give evidence respecting the matters in dispute, upon oath, (which the said arbitrators and referees are hereby empowered to administer,) or otherwise, or by otherwise ascertaining the true state of the case, in such manner as to such arbitrators and referees shall appear necessary, proceed to determine the matter or matters in dispute referred to them; and the award to be made by such arbitrators and referees shall be final and conclusive between the parties without being subject to review or challenge by any court or authority whatsoever.

Arrest and commitment of refractory witnesses.

S. 9. And be it further enacted, That it shall be lawful for any arbitrator or arbitrators, referee or referees, and he or they are hereby authorized and required at the request in writing of any of the parties to issue his or their summons to any witness or witnesses to appear and give evidence before such arbitrator or arbitrators, referee or referees, at the time and place appointed for hearing and determining any such dispute, and which time and place shall be specified in such summons; and if any person, so summoned to appear as a witness as aforesaid, shall not appear before such arbitrator or arbitrators, referee or referees, at the time and place specified in such summons, or offer some reasonable excuse for the default, or, appearing according to such summons, shall not submit to be examined as a witness. and give his evidence before such arbitrator or arbitrators, referee or referees, touching the matter of such dispute, then and in every such case it shall be lawful for any one or more of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, or place, where such dispute shall have arisen, and they are hereby authorized, (proof on oath, in the case of any person not appearing according to such summons, having been first made before such justice or justices of the due service of such summons on every such person by delivering the same to him, or by leaving the same twenty-four hours before the time appointed for such person to appear before such arbitrator or arbitrators, referee or referees, at the usual place of abode of such person,) by warrant under the hands of any such justice or justices to commit any such person so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of any such justice or justices, there to remain, without bail or mainprize, for any time not exceeding two calendar months nor less than seven days, or until such person shall submit himself to be examined, and give his evidence before such arbitrator or arbitrators, referee or referees, as aforesaid: Provided always, that in case such dispute shall be heard and determined before such offender shall submit to be examined, and give evidence as aforesaid, then and in every such case he, she, or they shall be imprisoned the full term of such commitment.

Adjourn-

S. 10. And be it further enacted, That in case such arbitrators and referees so

appointed cannot agree upon and decide such matter or matters in dispute so referred as aforesaid, or shall not make and sign their award within three days after the date of the order of such justice, certifying their appointment, then the said arbitrators and referees shall, without delay, go before the justice by whom they were appointed, and, in case of his absence or indisposition, before any other of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, liberty, or place, and residing nearest to the place where the meeting to settle such dispute shall have taken place, and shall state to such justice or justices who may be present the points in difference between them, the said arbitrators and referees, which points in difference the said justice or justices shall and is and are hereby authorized and required to hear and determine upon the statement of the arbitrators and referees; and the said justice or justices is and are hereby directed and required to settle and determine the matter in dispute with all possible dispatch, and in all cases within the space of two days after the expiration of the time hereby allowed to the arbitrators and referees to make and sign their award; and the determination of such justice or justices shall be final and conclusive between the parties so differing as aforesaid, without being subject to review or challenge by any court whatsoever.

ment of the complaint from the referees to a justice.

Proceeding where one referee refuses to go before the justice.

S. 11. And be it further enacted, That if either arbitrator or referee shall neglect or refuse to go before such justice of the peace in the manner herein directed, it shall and may be lawful for such justice, after summoning the arbitrators to attend him, to determine the matter or matters in dispute, upon the statement and representation of either of the arbitrators who shall come before him.

Manufacturer not to act as justice.

S. 12. Provided always, and be it further enacted, That no justice of the peace, being also a master manufacturer or agent, shall act as such justice under this act.

Disputes may be adjusted by any other mode of arbitration upon which the parties may agree.

S. 13. Provided always, and be it further enacted, That as well in all such cases of dispute as aforesaid as in all other cases, if the parties mutually agree that the matter in dispute shall be arbitrated and determined in a different mode to the one hereby prescribed, such agreement shall be valid, and the award and determination thereon final and conclusive between the parties; and the same proceedings of distress, sale, and imprisonment, as hereafter mentioned, shall be had towards enforcing such award, (by application to any justice of the peace of the county, stewartry, riding, division, barony, city, town, burgh, or place within which the parties shall reside,) as are by this act prescribed for enforcing awards made under and by virtue of its provisions.

Partners, agents, and servants of masters to be considered principals.

S. 14. Provided always, and be it further enacted, That where any work shall have been delivered to any workman by the agent or servant of any master or masters, to be when finished delivered to such agent or servant, and also where two or more persons shall carry on the business of such manufacture as partners, in every such case respectively the like proceedings shall and may be had and made against such agent, servant, or any partner, and shall be as effectual as if the same had been had and made against the principal or all the partners; and all the said persons respectively shall obey the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for refusing or delaying to abide by or perform the same, as if the proceedings had been had against the principal, or against all the partners.

Masters not resident on the spot may depute another person to act for them.

S. 15. And be it further enacted, That it shall be lawful in all cases for any master or workman by writing under his hand to authorize any person to act for him in submitting to arbitration and attending arbitrators or justices touching the matter of any arbitration.

Provision for the case of the master becoming bankrupt after pro-

S. 16. Provided also, and be it further enacted, That in all cases where any proceedings may be had against a master or masters under this act, or where such proceedings shall have been commenced, and the master or masters shall become or be bankrupt, or any assignment of his or their estate or effects shall have been made under the said bankruptcy, or otherwise by deed or in law, the factor or trustee upon or the assignee or assignees of such estate or effects shall

be liable to the proceedings authorized by this act against the master or masters, as fully as the master or masters was or were before the bankruptcy or assignment; and such proceedings may be commenced or carried on against such factor, trustee, assignee, or assignees, who shall fulfil and abide by the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for wilfully refusing or delaying to abide by or perform the same, as if the proceedings had been had against the master or masters before his or their bankruptcy, or the assignment of his or their estate or effects; provided that all sums of money to be paid in pursuance of such award or orders shall be recoverable only out of the estate or effects of such master or masters, and not out of the proper money of such factor, trustee, assignee, or assignees.

Proceedings commenced.

S. 17. And be it further enacted, That where any married woman or infant under the age of twenty-one years shall have cause of complaint in any of the cases provided for by this act against any master or masters, his or their agent or servant, or factor or trustee, or assignee or assignees as aforesaid, such complaint may be lodged and all further proceedings thereupon had by and in the name of the husband of such married woman, and of the father, or, if dead, of the mother, or, if on the death of both parents, of any of the kindred of any such infant, or of the surety or sureties in any indenture of apprenticeship of any such infant, being an apprentice, or of any person nominated by such infant, if he or she shall not have parent, kindred, or surety; and all such proceedings shall be as effectual, valid, and binding as if such married woman was sole, and such infants were of full age, and pursued by themselves the remedies provided by this act.

In whose name proceedings shall be where the complainant is a married woman or infant.

S. 18. And be it further enacted, That with every piece of work given out by the manufacturer to a workman to be done there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon; and which said note or ticket, in the event of dispute between the manufacturer and workman, shall be evidence of all matters and things mentioned therein or respecting the same.

Tickets of particulars shall be given out with the work.

S. 19. And be it further enacted, That a duplicate of every such note or ticket shall be made and kept by the master or agent delivering the same, which duplicate shall be evidence of all the matters and things therein contained, in case the workman shall not produce to the arbitrators or the said justice, as the case may be, the said note or ticket so delivered to him with the said work.

Duplicates of such tickets.

S. 20. And be it further enacted, That it shall not be allowable to any manufacturer, who shall have received into his possession any article without objection made within twenty-four hours, by himself or his clerk or foreman, afterwards to make any complaint on account of work so received.

Manufacturers receiving articles without objection not to complain afterwards.

S. 21. Provided always, and be it further enacted, That if the parties by and between whom the said reference shall take place as aforesaid shall think it expedient or be desirous to extend the time hereby limited for the making the award or umpirage, it shall and may be lawful for them to extend the same accordingly, by endorsement, according to the form in the schedule hereunto annexed, on the back of the order of the justice of the peace, certifying the appointment of the referees, to be signed by both of them in the presence of one or more credible witness or witnesses.

Extension of the time limited for making the award.

S. 22. And be it further enacted, That the award or umpirage to be made upon any reference demanded under this act shall and may be drawn up and written at the foot or upon the back of the said order, certifying the appointment of the referees, according to the form in the schedule hereunto annexed.

Form of the award in schedule annexed.

S. 23. And be it further enacted, That upon fulfilment of the award or umpirage the same shall be acknowledged by the party in whose behalf the same was made, by an acknowledgment at the foot of the said award, in the form of the schedule hereunto annexed, which, with the award, shall thereupon be delivered to the party fulfilling the same.

On the award being fulfilled, the fulfilment shall be acknowledged.

5 Geo. IV. c. 96.

The performance of the award may be enforced by distress, and failing that the party shall be imprisoned.

S. 24. And be it further enacted, That if any party shall refuse or delay to fulfil an award under this act for the space or term of two days after the same shall have been reduced into writing, it shall be lawful for any such justice as aforesaid, on the application of the party aggrieved, and he is hereby required, by warrant under his hand according to the form of the schedule hereunto annexed, or in some other form to the like effect, to cause the sum and sums of money directed to be paid by any such award to be levied by distress and sale of any goods and chattels of the person or persons liable to pay the same, together with all costs and charges attending such distress and sale, such sale to take place within such time not exceeding five days as the said justice shall think proper; and the overplus, if any, to arise by such sale, to be rendered to the owners of the goods and chattels distrained; and in case it shall appear by any return to such warrant that no sufficient distress can be readily had, which return may be in the form contained in the schedule hereunto annexed, or in some other form to the like effect, it shall be lawful for any such justice as aforesaid, and he is hereby required by warrant under his hand according to the form of the schedule hereunto annexed, or in some other form to the like effect, to commit the person or persons so liable as aforesaid to the common gaol, or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months.

In certain cases the warrant of distress shall be withheld, and the defaulter committed to prison.

S. 25. And whereas cases may occur where the recovery of such sum or sums of money by distress and sale of the goods and chattels of the defaulter may appear to the justice or justices of the peace by whom the warrant is to be issued to be attended with consequences ruinous or in an especial manner injurious to the defaulter and his family; to prevent which consequences, be it further enacted, That the said justice or justices, in all such cases, shall withhold such warrant, and commit the defaulter to the common gaol or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months; such commitment to be in the form or to the effect of the form in the schedule to this act annexed.

On payment of the sum awarded, with the costs and charges, the party shall be discharged from prison.

S. 26. And be it further enacted, That where any person shall be committed to prison for refusing or delaying to fulfil an award as aforesaid, and such person shall, at any time during the period of his or her imprisonment, pay to the governor or keeper of the prison the full amount of the sum awarded, with all reasonable expenses incurred through such refusal or delay, it shall be lawful for such governor or keeper of such prison, and he is hereby required, forthwith to discharge such person from his custody.

Warrant of commitment to be in form set forth in schedule.

S. 27. And be it further enacted, That the justice or justices by whom any person or persons shall be committed to prison for not appearing as a witness, or not submitting to be examined, shall cause the warrant or order for such commitment to be drawn up in the form or to the effect set forth in the schedule to this act.

No appeal or certiorari shall lie.

S. 28. And be it further enacted, That no appeal or certiorari shall lie against any proceedings under this act.

Proceedings not invalid for want of form.

S. 29. And be it further enacted, That no proceedings under this act shall be invalid for want of form.

Fees to be taken for proceedings under this act.

S. 30. And be it further enacted, That the following and no higher fees shall be allowed to be taken for any proceeding under this act; (that is to say,)

To the clerk of the justice or justices:

For each summons . . .	Two-pence.
For every oath or affirmation . .	Three-pence.
For drawing and entering the order . .	Four-pence.
For every warrant . . .	Sixpence.

To the constable or other peace officer:

For service of summons or order . .	Four-pence.
For executing warrant of distress and sale of goods	One shilling.

For custody of goods distrained, *per diem*	.	Three-pence.
For every mile he shall travel	.	Three-pence.
For every caption	.	Sixpence.

And a table of fees, signed by the clerk to such justice or justices, shall be hung up in every place where any general or quarter session, or petty or other sessions of the peace shall be held.

Costs and expenses how to be settled.

S. 31. And be it further enacted, That all costs, time, and expenses attending the application to justices, to be made under this act, and of the arbitration pursuant thereon, shall be settled by the arbitrators or arbitrator by whom such dispute shall be settled: and where the same shall be determined by any justice of the peace, pursuant to this act, then the costs, time, and expenses aforesaid shall be settled by such justice; and where the arbitrators appointed as aforesaid cannot agree as to the costs, time, and expenses to be allowed, the same shall be settled by the justice or justices of the peace by whom the said arbitrators were named, and in case of his absence or indisposition, by any justice of the peace for the same county, stewartry, riding, division, barony, city, burgh, liberty, town, or place nearest to the place at which the arbitrators met to settle the dispute: Provided always, that no master manufacturer, his foreman or agent, shall in any case be allowed for costs, time, or expenses, by the said justice or justices, unless it shall appear to him or them that the proceedings of the workmen were vexatious and oppressive.

Proceedings exempt from stamp duty.

S. 32. Provided always, and be it enacted, That every agreement, submission, award, ticket, matter, or thing, under and by virtue of this act, or relating to any other mode of arbitration as aforesaid, shall and may be drawn up and written upon unstamped paper.

Limitation of time for suing those who act in execution of this act.

S. 33. Provided also, and be it further enacted, That no action shall be brought against any arbitrator, justice of the peace, constable, headborough, or other officer, or against any other person or persons whomsoever, for any matter or thing whatsoever done or committed under or by virtue or in the execution of this act, unless such action shall be brought within six calendar months next after the doing or committing of such matter or thing.

Persons sued for acting in execution of this act may plead the general issue.

S. 34. Provided also, That if any action or suit shall hereafter be commenced or prosecuted against any person or persons for any thing done under, by virtue, or in the execution of this act, such person or persons may plead the general issue, and give this act and the special matter in evidence; and if the plaintiff shall become nonsuited, or suffer discontinuance, or forbear further prosecution, or if judgment shall be given for the defendant or defendants, such defendant or defendants shall recover his, her, or their full costs, and for which he, she, or they shall have like remedy as in cases where costs by law are given to defendants.

Not to extend to repeal any act not hereby repealed.

S. 35. Provided always, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to repeal, abridge, annul, or make void any of the clauses, provisions, remedies, or powers contained in any law or statute now in force, and not repealed by this act.

SCHEDULE.

Form of the award to be written at the foot or upon the back of the order of the justices of the peace certifying the reference.

We, I. K. and L. M. [*name and describe the referees*], the referees appointed to settle the matters in dispute between the parties within named [*or* I. K., one of the referees so appointed; *or* L. M., the other referee appointed, having failed to

5 Geo. IV. c. 96.

attend; *or* I., N. O. the justice, *as the case may be*], do hereby adjudge and determine that [*here set forth the determination: to which the referee or referees, or justice, as the case may be, shall subscribe their names.*]

Form of endorsement, extending the time limited for making the award.

We, A. B. and C. D., parties to the within reference, do hereby agree to extend the same to the day of inclusive. Witness our hands this day of .

A. B.
Witness. C. D.

Form of acknowledgment of fulfilment of the award, to be written at the foot or on the back thereof.

I, A. B., do hereby acknowledge that the above award hath been fulfilled by C. D., who is hereby discharged of the same. Witness my hand this day of .

Witness, A. B.

Form of the oath to be administered by the arbitrators or justice to the parties and witnesses under this act.

The evidence that you shall give before us, the arbitrators appointed by A. B., and C. D. [*the parties*] to determine the matters in difference between them, under and by virtue of an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act" [*state the title of this act*], shall be the truth, the whole truth, and nothing but the truth.

So help you God.

Form of commitment of a person summoned as a witness before the arbitrators.

Whereas proof on oath hath been made before me, one of his Majesty's justices of the peace for the county [*or* riding, stewartry, division, city, burgh, liberty, town, *or* place] of on this day of that A. B. hath been duly summoned, and hath neglected to appear and give evidence before C. D. and E. F. the arbitrators appointed by and between G. H. and I. K. to determine the matters in dispute between them at in the county [*or* riding, stewartry, division, city, burgh, liberty, town, *or* place] of on the day of under and by virtue of an act made in the fifth year of the reign of his present Majesty, intituled "An Act" [*here set forth the title of this act*], and the said A. B. being required by me, the said justice, to give evidence before the said arbitrators, and still refusing so to do, therefore I, the said justice, do hereby, in pursuance of the said act, commit the said A. B. to the [*describing the prison and the house of correction*], there to remain without bail or mainprize for his [*or* her] offence aforesaid until he [*or* she] shall submit himself [*or* herself] to be examined, and give his [*or* her] evidence before the said arbitrators, touching the matters referred to them as aforesaid, or shall otherwise be discharged by due course of law: And you, the [*constable or other peace officer or officers to whom the warrant is directed*] are hereby authorized and required to take into your custody the body of the said A. B., and him [*or* her] safely to convey to the said prison [*or* house

of correction], and him [*or* her] there to deliver to the gaoler [*or* keeper] thereof, who is hereby authorized and required to receive into his custody the body of the said A. B., and him [*or* her] safely to detain and keep, pursuant to this commitment. Given under my hand this day of in the year of our Lord .

[*This commitment to be directed to the proper peace officer, and the gaoler* [or *keeper*] *of the prison* [or *house of correction*].

Form of warrant of distress.

To the constable of .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act*], is liable to pay to of the sum of and also the sum of and the said having refused or neglected to pay the same for the space of two days and upwards subsequent to the making such award, these are therefore to command you to levy the said sum of by distress and sale of the goods and chattels of the said ; and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of within days, unless the said sum of for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are also hereby commanded to certify to me what you shall do by virtue of this my warrant. Given under my hand and seal at the day of .

Form of the constable's return to the warrant of distress.

I, constable of do hereby certify to justice of the peace of that I have made diligent search for, but do not know of, nor can find any goods and chattels of by distress and sale whereof I may levy the sum of pursuant to his warrant for that purpose. Dated the day of in the year of our Lord . Given under my hand this day of in the year of our Lord .

Form of commitment thereupon to the house of correction.

Here name the county. } To the constable of and also to the keeper of the house of correction at .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act*], became liable to pay to the sum of and also the sum of for costs, time, and expenses, making together the sum of and having refused or neglected to pay the same for the space of two days and upwards subsequent to the making of such award, my warrant was, according to the provisions of the said act, duly made and issued for the levying the said sum of by distress and sale of the goods and chattels of

5 Geo. IV. c. 96.

the said : And whereas it appears by the return of constable of dated the day of that he hath made diligent search for, but doth not know of, nor can find any goods and chattels of the said by distress and sale whereof the said sum of may be levied pursuant to my said warrant: These are therefore to command you the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and deliver him there to the keeper of the said house of correction; and these are also to command you, the keeper of the said house of correction, to receive him the said into the said house of correction, and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid, shall be sooner satisfied, with all reasonable expenses. Given under my hand and seal at the day of .

Form of commitment where the warrant of distress is withheld.

Here name the county. To the constable of and also to the keeper of the house of correction at .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act*], became liable to pay to the sum of and also the sum of for costs, time, and trouble, making together the sum of which he has refused or neglected to pay for the space of two days and upwards subsequent to the making of such award: And whereas it appears to me that the recovery of such sum and warrant of distress and sale of the goods and chattels of the said will be attended with consequences ruinous or in an especial manner injurious to the defaulter [and his family, *if any*], and I have therefore determined to withhold such warrant and to commit the said to prison, pursuant to the said act: These are therefore to command you, the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and to deliver him there to the keeper of the said house of correction: And these are also to command you, the keeper of the said house of correction, to receive him, the said into the said house of correction, and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid shall be sooner satisfied, with all reasonable expenses. Given under my hand and seal at the day of .

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7 Will. IV. & 1 Vict. c. 67.

7 Will. IV. & 1 Vict. c. 67.

An Act to amend an Act of the fifth year of his Majesty, King George the Fourth, for consolidating and amending the Laws relative to the arbitration of disputes between Masters and Workmen. [*15th July*, 1837.

5 G. 4, c. 96.

Whereas an act was passed in the fifth year of the reign of his Majesty, King George the Fourth, intituled "An Act to consolidate and amend the Laws relative to the arbitration of disputes between Masters and Workmen:" and whereas it is provided by the said act that all complaints under the same by any workman for any cause except as to bad materials, shall be made within six days after such cause of complaint shall arise; but the said period of six days has been found too short for the purpose thereby intended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords

Period for making complaints extended.

Spiritual and Temporal and Commons in this present parliament assembled, and by the authority of the same, that the same be extended to fourteen days. 7 WILL IV. & 1 VICT. c. 67.

S. 2. And whereas it is enacted by the said act, That various differences under the same shall be subject, as therein mentioned, to the adjudication of any justice of the peace or magistrate of any county, riding, division, stewartry, barony, city, burgh, town, or place, within which the parties reside: and whereas many cases have arisen, where no justice of the peace or magistrate could be found who has jurisdiction where both the parties differing as aforesaid reside: in consequence whereof it has been doubted whether the above beneficial enactment can in such cases take effect; and for the remedy thereof it is necessary that the jurisdiction and powers which are by the said act conferred on the justices or magistrates of the district where both parties reside shall in future be exercised by the justices or magistrates of the district where the party complained against resides: Be it enacted, That in the place of the justices or magistrates of the district where both parties reside the justices or magistrates of the district where the parties complained against reside shall have the said jurisdiction and powers: and whatever acts and duties are by the said act required to be done by the first mentioned justices or magistrates, or any one of them, shall be done by the last mentioned justices or magistrates or by any one of them; and the said act shall in all respects be construed as if the words, "where the party complained against resides," had been originally inserted in the third section of the said act instead of the words "within which the parties reside." Justices having jurisdiction where the party complained against resides to have jurisdiction in the matters of the said act.

S. 3. And be it further enacted, That wherever the expression, "justice of the peace," occurs in the said act, it shall be construed to mean "magistrate." Interpretation of "Justice."

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8 & 9 VICT. c. 77.

8 & 9 VICT. c. 77.

An Act to make further regulations respecting the Tickets of Work to be delivered to Persons employed in the Manufacture of Hosiery in certain cases. [*4th August*, 1845.]

[S. 1. *Manufacturer of Hosiery to deliver ticket containing agreement with materials of work.* S. 2. *Ticket, and duplicate of it to be evidence*].

S. 3. Provided always and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to a manufacturer or his agent, such piece of work shall be produced in order to adjudication; or if not produced, shall be deemed and taken to have been sufficiently and properly executed. When dispute arises as to imperfect execution, the work to be produced.

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8 & 9 VICT. c. 128.

8 & 9 VICT. c. 128.

An Act to make further regulations respecting the Tickets of Work to be delivered to Silk Weavers in certain cases. [*9th August*, 1845.]

[*This Act contains provisions similar to those of the* 8 & 9 *Vict. c.* 77, *as to manufacturers of silk goods, or goods made of silk mixed with other materials. The third section is word for word the same.*]

ACTS CONCERNING BANKRUPTS AND INSOLVENTS.

6 Geo. IV. c. 16.

6 Geo. IV. c. 16.

An Act to amend the laws relating to Bankrupts. [*2nd May*, 1835.]

Assignees, with consent of creditors, obtained as herein mentioned, may compound or submit disputes to arbitration, or commence suits in equity.

S. 88. And be it enacted, that the assignees, with the consent of the major part in value of creditors, who shall have proved under the commission, present at any meeting, whereof, and of the purport whereof, twenty-one days notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt; or may submit any dispute between such assignees and any persons, concerning any matter relating to such bankrupt's estate, to the determination of arbitrators to be chosen by the assignees, and the major part in value of such creditors, and the party with whom they shall have such dispute; and the award of such arbitrators shall be binding on all the creditors: and the assignees are hereby indemnified for what they shall do according to the directions aforesaid; and no suit in equity shall be commenced by the assignees without such consent as aforesaid: provided that if one third in value or upwards of such creditors shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid,) the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid.

Meetings of creditors to be attended by one third in value or upwards.

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1 & 2 Will. IV. c. 56.

1 & 2 Will. IV. c. 56.

An Act to establish a Court in Bankruptcy. [*20th Oct.* 1831.]

Arbitration.

S. 43. And be it enacted, that if the assignees of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record.

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1 & 2 Vict. c. 110.

1 & 2 Vict. c. 110.

An Act for abolishing Arrest on Mesne Process in civil actions, except in certain cases; for extending the Remedies of Creditors against the property of Debtors; and for amending the laws for the relief of Insolvent Debtors in England. [*16th Aug.* 1838.]

Assignees may sue in their own names.

S. 51. And be it enacted, that it shall be lawful for the assignee or assignees of any such prisoner, and such assignee or assignees is and are hereby empowered to sue from time to time, as there may be occasion, in his or their own name or names, for the recovery, obtaining, and effforcing of any estate, effects, or rights of such prisoner, but in trust for the benefit of the creditors of such prisoner, according to the provisions of this act, and to give such discharge and discharges to any person or persons who shall be respectively indebted to such prisoner as may be requisite; and to make compositions with any debtors or accountants to such prisoner where the same shall appear necessary, and to take such reasonable part of any such debts as can upon such composition be gotten, in full discharge

May make composition for debts.

of such debts and accounts; and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons for or on account or by reason of any matter, cause, or thing relating to the estate and effects of such prisoner: provided nevertheless, that no such composition, or submission to arbitration shall be made, nor any suit in equity be commenced, by any such assignee or assignees, without the consent in writing of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice of such meeting, to be published at least fourteen days before such meeting in the London Gazette, and also in some newspaper most usually circulated in the neighbourhood of the place, where such prisoner had his or her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said court, or of one of the commissioners thereof.

1 & 2 Vict. c. 110.

May submit differences to arbitration.

Proviso for consent of creditors to compositions and arbitrations.

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7 & 8 Vict. c. 96.

7 & 8 Vict. c. 96.

An Act to amend the law of Insolvency, Bankruptcy, and Execution.
[*9th August*, 1844.]

S. 13. And be it enacted, that it shall be lawful for the assignee or assignees of any such petitioner, and such assignee or assignees shall be hereby empowered to sue from time to time, as there may be occasion, in his or their own name or names, for the recovery, obtaining, and enforcing of any property or rights of such petitioner, but in trust for the benefit of the creditors of such petitioner, according to the provisions of the said recited act and this act, and to give such discharge and discharges to any person or persons who shall be respectively indebted to such petitioner as may be requisite; and to make compositions with any debtors or accountants to such petitioner, where the same shall appear necessary, and to take such reasonable part of any such debts as can upon such composition be gotten, in full discharge of such debts and accounts; and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons, for, or on account, or by reason of any matter, cause, or thing, relating to the property of such petitioner: provided nevertheless, that no such composition, or submission to arbitration, shall be made, nor any suit in equity be commenced, by any such assignee or assignees, without the consent in writing of the major part in value of the creditors of such petitioner, who shall meet together pursuant to a notice of such meeting, to be published at least fourteen days before such meeting in the London Gazette, and also in some newspaper usually circulated in the neighbourhood of the place, where such petitioner had his last usual residence before the filing of his petition, nor without the approbation of the commissioner.

Assignees may sue in their own names.

May make composition for debts.

May submit disputes to arbitration.

Proviso for consent of creditors to compositions and arbitrations.

ACTS CONCERNING SAVINGS' BANKS.

9 Geo. IV. c. 92.

9 Geo. IV. c. 92.

An Act to consolidate and amend the laws relating to Savings' Banks.
[*28th July*, 1828.]

S. 45. And be it further enacted, that if any dispute shall arise between any such institution or any person or persons acting under them, and any individual depositor therein, or any executor, administrator, next of kin, or creditor of any deceased depositor, or any person claiming to be such executor, administrator, next of kin, or creditor, then, and in every such case, the matter so in dispute shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of such institution, and the other by the party with whom the dispute arose; and in case the arbitrators so appointed shall not agree, then such matter in dispute shall be referred in writing to

Where disputes arise, same to be referred to arbitrators, and in case of their not agreeing, to be settled by a barrister.

9 Geo. IV. c. 92.

the barrister-at-law so to be appointed by the said commissioners as aforesaid, [*i. e. the barrister appointed to certify the rules of savings' banks*] who shall receive a fee of not more than one guinea; and whatever award, order or determination shall be made by the said arbitrator, or by the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal; and the said award, order, or determination, shall declare by whom the said fee, payable to the said barristers shall be paid, and no submission to, or award, order, or determination of the said arbitrators, or of the said barrister, shall be subject, or liable to, or charged with, any stamp duty or duties whatever.

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7 & 8 Vict. c. 83.

7 & 8 Vict. c. 83.

An Act to amend the laws relating to Savings' Banks, and to the purchase of Government Annuities, through the medium of Savings' Banks.
[*9th August*, 1844.]

Settlement of disputes.

S. 14. And be it enacted, that if any dispute shall arise between the trustees and managers of any Savings' Bank, and any individual depositor therein, or any executor, administrator, next of kin, or creditor, or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such Savings' Bank, then and in every such case the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said recited acts, who shall have power to proceed ex parte, on notice in writing to the said trustees or managers, left or sent by the said barrister to the office of the said institution; and whatever award, order, or determination shall be made by the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal; and no submission to, or award, order, or determination of the said barrister shall be subject, or liable to, or charged with, any stamp duty whatever.

On reference barrister may inspect books, and administer oath to witnesses.

S. 15. And be it enacted, that on any such reference it shall be lawful for the said barrister, and he is hereby authorized to inspect any book or books belonging to the said institution relating to the matter in dispute, and to administer an oath to any witness appearing before him, or to take the affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

Provisions of this act to apply to purchasers of annuities.

S. 21. And be it enacted, that all the provisions of this act, in as far as the same can or may be applicable, shall apply to the trustees and managers of any government annuity society, and to the parties purchasing annuities, and to the rules and regulations to be made for carrying the same into effect.

ACTS CONCERNING FRIENDLY SOCIETIES.

10 Geo. IV. c. 56.

10 Geo. IV. c. 56.

An Act to consolidate and amend the laws relating to Friendly Societies.
[19*th June*, 1829.]

Rules to be made directing how disputes shall be settled.

S. 27. Provided always and be it further enacted, that provision shall be made by one or more of the rules of every such society, to be confirmed as required by this act, specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof,

or person claiming on account of any member, shall be made to such of his Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators to be appointed in manner hereinafter directed; and if the matter so in dispute shall be referred to arbitration, certain arbitrators shall be named and elected at the first meeting of such society, or general committee thereof, that shall be held after the enrolment of its rules, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the said society, of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute, the number of the said arbitrators, and the mode of ballot, being determined by the rules of each society respectively; the names of such arbitrators shall be duly entered in the book of the said society, in which the rules are entered as aforesaid: and in case of the death, or refusal, or neglect of any or all of the said arbitrators to act, it shall and may be lawful for the said society, or general committee thereof, and they are hereby required, at their next meeting, to name and elect one or more arbitrator or arbitrators as aforesaid to act in the place of the said arbitrator or arbitrators so dying or refusing or neglecting to act as aforesaid; and whatever award shall be made by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules of such society, confirmed by the justices according to the directions of this act, shall be in the form to this act annexed, and shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without appeal, or being subject to the control of one or more justices of the peace, and shall not be removed or removeable into any court of law, or restrained or restrainable by the injunction of any court of equity, &c. [*Payment of the sum awarded to be enforced by distress and sale under justice's warrant.*]

Appointment of arbitrators.

Schedule A.

FORM OF AWARD.

We, the major part of the arbitrators, duly appointed by the [ ] Society, established at [ ], in the county of [ ], do hereby award and order that A. B. [*specifying by name the party or the officer of the society*] do, on the [ ] day of [ ], pay to C. D. the sum of [ ] [*or* we do hereby reinstate in, *or* expel A. B. from the said society] [*as the case may be*]. Dated this [ ] day of [ ], one thousand eight hundred and [ ].

E. F.
G. H.

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4 & 5 WILL. IV. c. 40.

An Act to amend an Act of the tenth year of his late Majesty King George the Fourth, to consolidate and amend the laws relating to Friendly Societies. [30*th July*, 1834.]

S. 7. And whereas in and by the said recited act, provision is directed to be made by the rules of every society whether reference of any matter in dispute shall be made to justices or to arbitrators: and whereas it is expedient that further provision should be made in case the reference is to arbitrators; be it therefore enacted, that when the rules of any society provide for a reference to arbitrators of any matter in dispute, and it shall appear to any justice of the peace, on the complaint on oath of a member of any such society, or of any person claiming on account of such member, that application has been made to such society, or to the steward, or other officer thereof, for the purpose of having any

If rules of society direct reference in case of dispute to arbitration, and society refuse to grant arbitrators, &c. justices may

4 & 5 WILL. c. 40.

dispute so settled by arbitration, and that such application has not within forty days been complied with, or that the arbitrators have neglected or refused to make any award, it shall and may be lawful for such justice to summon the trustee, treasurer, steward, or other officer of the society, or any one of them against whom the complaint is made, and for any two justices to hear and determine the matter in dispute, in the same manner as if the rules of the said society had directed that any matter in dispute as aforesaid should be decided by justices of the peace, anything in the said recited act contained to the contrary notwithstanding.

determine the dispute.

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9 & 10 VICT. c. 27.

9 & 10 VICT. c. 27.

An Act to amend the laws relating to Friendly Societies. [*3rd July*, 1846.]

Settlement of disputes between managers and members, &c. may be referred to registrar, unless law officers refer the same to a superior court.

S. 15. And be it enacted, that every dispute between the trustees or managers of any Friendly Society and any member or officer thereof, or any executor, administrator, or next of kin of any such trustees, managers, member, or officer, or any creditor or assignee of any trustees, managers, member, or officer of any such society who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money paid to such society, or to any benefit arising therefrom, or with respect to the management of the affairs of such societies, for the settlement of which, according to the laws now in force, recourse must be had in England or Ireland to one of her Majesty's superior courts of law or equity, and in Scotland to the Court of Session or Sheriff Court, may be referred in writing to the Registrar of Friendly Societies in England, Ireland, and Scotland respectively; and where the value of such subject-matter in dispute does not exceed £20, every such dispute shall be so referred, unless, in England or Ireland her Majesty's attorney or solicitor-general, or in Scotland the lord advocate, shall certify in writing under his hand that such dispute ought to be decided by the judgment of a superior court of law or equity; and the said Registrar shall have power to proceed ex parte on notice in writing to the said trustees or managers left or sent by the said Registrar to the office of the said institution, or to the last known place of residence of such trustees, managers, members, or officers; and whatever award, order, or determination shall be made by the said Registrar shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal; and all payments, assignments, sales, and transfers, made in pursuance of any such order shall be good in law; and no submission to or award or determination of the said Registrar shall be subject or liable to or charged with any stamp duty whatever.

On such reference registrar may inspect books, &c. False evidence perjury.

S. 16. And be it enacted, that on any such reference the said Registrar shall be authorized to inspect and to require the production before him of any book or books belonging to the said institution relating to the matter in dispute, and to administer an oath to any witness appearing before him; and every person who upon such oath, shall wilfully and corruptly give any false evidence before such Registrar shall be deemed to be guilty of perjury.

Secretary of state to fix amount of fees payable on reference, and registrar to determine who shall pay them.

S. 18. And be it enacted, that one of her Majesty's principal secretaries of state shall be empowered from time to time to fix reasonable fees to be paid on any such reference, and for such other proceedings as aforesaid, and all such fees shall be paid in the first instance by the trustees or managers of the society, and the Registrar shall determine in and by his award by which of the parties and in what proportion the expense of such fees shall be finally borne, and the trustees or managers of such society, having paid such fees, shall be entitled to recover them from the party or parties against whom they shall be so finally awarded.

S. 19. [*Payment of sum awarded to be enforced by distress under justices' warrant.*]

9 & 10 Vict. c. 27.

S. 20. And be it enacted, that every transcript of the rules of any such society purporting to be certified by the Registrars of Friendly Societies in England, Ireland, or Scotland, and every award or other proceeding as aforesaid purporting to be executed under the hand of the said Registrar, shall be receivable in all courts and before all justices and others as evidence that such rules have been duly certified, or such award made, or such proceeding had, until the contrary shall be made to appear.

Rules and awards may be received in evidence.

S. 21. And be it enacted, that the forms of certificate and award which are set forth in the schedule annexed to this act, may be used with such alterations as may be necessary to adapt them to the particular circumstances of each case, and that no objection shall be made or advantage taken for want of form in any such proceedings by any person whomsoever.

Forms set forth in the schedule to this act may be used.

S. 22. And be it enacted, that this act shall be construed with and as part of the said acts of the tenth year of the reign of King George the Fourth, and of the fifth year of the reign of his late Majesty.

Act to be construed with 10 G. 4, c. 56, and 4 & 5 W. 4, c. 40.

Schedule to which this Act refers.

FORM OF REGISTRAR'S AWARD.

In pursuance of the provisions contained in the act to amend the laws relating to Friendly Societies, I, A. B., the Registrar of Friendly Societies in England, (Ireland, or Scotland,) do hereby award, order, and determine that C. D. [*specifying the name of the party or officers of the society*] do, on the [ ] day of [ ], at [ ], pay to E. F. the sum of [ ]: and I do further award, order, and determine, that the fees of this my award, amounting to [ ], shall be borne and paid by the said [ ].

A. B.

The Registrar of Friendly Societies in England, (Ireland, or Scotland.)

[ ] day of [ ].

2 & 3 Will. IV. c. 80.

2 & 3 Will. IV. c. 80.

An Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations. [3*rd August*, 1832.]

Whereas the archbishops and bishops of the several dioceses, and the deans, and deans and chapters, archdeacons, prebendaries, and canons, and other dignitaries and officers of the several cathedral and collegiate churches and chapels, and the masters or other heads and fellows and scholars or other societies of the several colleges and halls in the universities of Oxford and Cambridge, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tenements, tithes, and hereditaments, and in many cases the boundaries or quantities and the identity of lands within such manors, and of such messuages, lands, tenements, and hereditaments, and of lands subject to any such tithes, or some part or parts thereof, are unknown or disputed, and it would be a great benefit, as well to such proprietors respectively, as to their lessees, copyhold or customary tenants, sub-lessees or under-tenants, their, his, or her heirs, executors, administrators, or assigns, if the said messuages, lands, tenements, tithes, and hereditaments were identified, and the boundaries and quantities thereof ascertained and finally settled: be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act it shall and may be lawful to and for any archbishop, bishop, dean, dean and chapter, or other cor-

Archbishops, bishops, dean,

2 & 3 Will. IV. c. 80.

and chapters, &c., may enter into agreements or deeds of reference with their lessees, to ascertain and settle unknown or disputed boundaries or quantities of manors, &c. leased.

poration aggregate or sole hereinbefore mentioned, to enter into an agreement of reference or deed of submission with his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or with the owner or owners of any other hereditaments adjoining to or intermixed with the said manors, messuages, lands, tenements, tithes, or hereditaments, whereby it shall be agreed that any unknown or disputed boundaries or quantities of such manors, messuages, lands, tenements, tithes, or hereditaments, or any part thereof, shall be referred to the adjudication of such person or persons as may be agreed upon and named by the said archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole, and by his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or by such owner or owners of any other hereditaments situate as aforesaid; and that such referee or referees shall be fully authorized to make or cause to be made surveys, maps, and admeasurements of the said manors, messuages, lands, tenements, tithes, and hereditaments, or any part thereof, and to summon any persons as witnesses, and examine them on oath, (which oath he or they are hereby authorized to administer,) touching or concerning any of the matters or things so referred as aforesaid, or in any way relating thereto; and also to call for the production of all surveys, maps, deeds, books, papers, and writings in the custody or power of any of the parties to the said reference, or of any other person or persons, of or concerning the matters in question; and the said referee or referees, having well and sufficiently investigated and considered the same, and all matters to him or them referred, shall and may make his or their award or awards in writing, under his or their hand and seal or hands and seals with a map or maps drawn thereupon or thereunto annexed, and which said award or awards and map or maps shall be upon parchment or vellum, and shall award and determine, identify, delineate, and describe the boundaries, quantities, particulars, and situations of the said manors, messuages, lands, tenements, tithes, and hereditaments so referred to him or them as aforesaid; and the said award or awards and map or maps shall be laid before all the parties to any such agreement of reference or deed of submission, including the party or parties whose consent is required by this act, whose approbation thereof shall be written upon the said award or awards, and shall be signed and sealed by them, and thereupon the said award or awards and map or maps shall be for ever afterwards binding upon all parties, and final and conclusive as to all matters therein contained or thereby referred to.

Referees to make surveys, maps, and admeasurements; to summon and examine witnesses upon oath; to call for all deeds, &c.; to make awards with maps thereto, on parchment or vellum.

Awards and maps to be laid before parties, and their approbation to be written.

Certain consents required to render valid proceedings under this act.

S. 2. Provided always, and be it further enacted, that in every case in which any of the powers hereinbefore contained shall be exercised by any bishop, dean, archdeacon, prebendary, or other ecclesiastical corporation sole, the deed of submission or agreement of reference, and also the approbation of the award, shall, in the case of a bishop, be executed by the archbishop of the province testifying his consent thereto; or in case of a dean, the same shall be executed by the dean and chapter testifying their consent thereto; or in case of an archdeacon, prebendary, or other ecclesiastical corporation sole, the same shall be executed by the archbishop or bishop of the diocese testifying his consent thereto.

Power to infants, married women, lunatics, &c., to enter into reference.

S. 3. And be it further enacted, that from and after the passing of this act it shall and may be lawful to and for the said lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who at the time of making any reference authorized by this act shall be tenant or tenants in fee tail, general or special, or for life or lives, and for the guardians, husbands, committees, or attornies of or acting for any such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who, at the time of making any such reference, shall be respectively an infant or infants, feme covert or femes covert, or of unsound mind, or beyond the seas, or under any other legal disability, or otherwise disabled to

act for themselves, himself, or herself, to sign, seal, and deliver any agreement of reference or deed of submission or approbation of any award or awards and map or maps authorized by this act to be made, as fully and effectually to all intents and purposes as if such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, had been tenant or tenants in fee simple, and of full age, sole, of sound mind, or within the realm of England, and not under any other legal disability. 2 & 3 WILL. IV, c. 80.

Agreements or deeds of reference, awards and maps, to be deposited in registry of archbishop, bishop, &c.

S. 4. And be it further enacted, that immediately after the execution by the parties of the instrument showing their approbation of any award to be made by virtue of this act, the agreement of reference or deed of submission, and also the award or awards and map or maps, authorized to be made by this act, and a copy of the minutes of evidence whereupon the same is made, shall be deposited, in the case of any reference by any archbishop or bishop, in the office of their own registrar; and in case of any reference by any dean, dean and chapter, archdeacon, prebendary, canon, and other dignitary and officer of a cathedral or collegiate church or chapel, in the office of the registrar of the dean and chapter thereof; and in case of any reference by any masters or other heads or by any fellows and scholars or other societies hereinbefore named, in the office of the steward or other proper officer of their said colleges and halls; and every such registrar, steward, or other officer, or some person or persons on his behalf, shall produce the documents and papers so deposited with him, or any of them, at all proper and usual hours of business, to every person interested in the subject-matter of such award, or to his or her agent duly authorized, who shall make application to inspect the same or any of them, and shall furnish a copy or copies of the same or any of them to every such person or agent who shall make application for such copy or copies; and every such registrar, steward, or other officer shall in every case be entitled to the sum of five shillings and no more for receiving and preserving the agreement of reference or deed of submission, award or awards, map or maps, and copy of the minutes of evidence as aforesaid; and the sum of one shilling and no more for every production of the same or any of them to be inspected; and the sum of sixpence and no more for every folio containing seventy-two words of every copy; and the sum of ten shillings and no more for every copy of a map so made as aforesaid.

Documents to be produced for inspection.

Registrar's fees.

Expenses of reference, how to be paid.

S. 5. And be it further enacted, that the expenses attending every reference which shall be made under the authority of this act, and all the proceedings hereby required relating to the same, shall be paid and borne by the parties thereto in such manner, shares, and proportions as they shall agree; and in case the said parties shall not make any agreement relating to such expenses, then all such expenses, or so much thereof as shall not be provided for by such agreement, shall be paid and borne by the said parties in equal moieties.

Act limited to England and Wales.

S. 6. Provided also, and be it further enacted, that this act shall extend only to that part of the United Kingdom called England and Wales.

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3 & 4 WILL. IV. c. 42. (a).

3 & 4 WILL. IV. c. 42.

An Act for the further amendment of the Law, and the better advancement of Justice. [14*th August*, 1833.]

Submission to arbitration by rule of court, &c. not to be revocable without leave of the court.

S. 39. And whereas it is expedient to render references to arbitration more effectual; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of Nisi Prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an

(a) The Irish Act, the 3 & 4 Vict. c. 105, has sections 63, 64 and 65, corresponding to sections 39, 40, and 41, of the 3 & 4 W. IV. c. 42.

3 & 4 WILL. IV. c. 42.

agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award.

Power to compel the attendance of witnesses.

S. 40. And be it further enacted, that when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Power for the arbitrators under a rule of court to administer an oath.

S. 41. And be it further enacted, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

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1 & 2 VICT. c. 98.

1 & 2 VICT. c. 98.

An Act to provide for the Conveyance of the Mails by Railways.

[14*th Aug.* 1838.]

[*By this Statute differences respecting the amount of remuneration to be paid to a Railway Company for carrying the Mails are to be determined by arbitration. ss.* 6, 7, 17.]

For settling differences between Postmaster-general and Railway Companies in certain cases.

S. 16. And be it enacted, that in all cases in which the Postmaster-general and any Company of proprietors of any Railway shall not be able to agree on the amount of remuneration or compensation to be paid by the Postmaster-general to such Company of proprietors for any services performed or to be performed by them as hereinbefore mentioned, the same shall be referred to the award of two persons, one to be named by the Postmaster-general, and the other by such Company; and if such two persons cannot agree on the amount of such remuneration or compensation, then to the umpirage of some third person, to be ap-

pointed by such two first-named persons previously to their entering upon the inquiry; and the said award or umpirage, as the case may be, shall be binding and conclusive on the said parties, and their respective successors and assigns. 1 & 2 Vict c. 98.

S. 18. And be it enacted, that in all references to be made under the authority of this act, the Postmaster-general, or the Railway Company, as the case may be, shall nominate his or their arbitrator within fourteen days after notice from the other party, or in default it shall be lawful for the arbitrator appointed by the party giving notice to name the other arbitrator; and such arbitrators shall proceed forthwith in the reference, and make their award therein within twenty-eight days after their appointment, or otherwise the matter shall be left to be determined by the umpire; and if such umpire shall refuse or neglect to proceed and make his award for the space of twenty-eight days after the matter shall have been referred to him, then a new umpire shall be appointed by the two first-named arbitrators, who shall in like manner proceed and make his award within twenty-eight days, or in default be superseded, and so toties quoties. Nomination of arbitrators to be within a limited time after application for references made.

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8 & 9 Vict. c. 16.

8 & 9 Vict. c. 16.

An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of Companies incorporated for carrying on undertakings of a public nature (*b*). [*8th May*, 1845.]

[*By s.* 4, *the act may be cited as* "The Companies Clauses Consolidation Act, 1845."]

And with respect to the settlement of disputes by arbitration, be it enacted as follows:— *Arbitration.*

S. 128. When any dispute authorized or directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom such dispute shall be referred; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final. Appointment of arbitrator when questions are to be determined by arbitration.

S. 129. If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable or refuse or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid. Vacancy of arbitrator to be supplied.

S. 130. Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect appoint another umpire in his place; and the decision of any such umpire on the matters so referred to him shall be final. Appointment of umpire.

(*b*) "The Companies Clauses Consolidation (Scotland) Act, 1845," is the 8 & 9 Vict. c. 17.

8 & 9 Vict. c. 16.

Appointment on neglect of arbitrators in case of railway companies.

S. 131. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a Railway Company shall be one party to the arbitration, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final.

Power of arbitrators to call for books, &c.

S. 132. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Costs in their discretion.

S. 133. Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators or their umpires, as the case may be.

Submission to arbitration a rule of court.

S. 134. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.

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8 & 9 Vict. c 18.

8 & 9 Vict. c. 18.

An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of Lands for undertakings of a public nature (c). [*8th May*, 1845.]

[*By s. 4, the act may be cited as*, "The Lands Clauses Consolidation Act, 1845."]

["With respect to the purchase and taking of lands otherwise than by agreement," *it is provided in the following words:*]—

Compensation exceeding 50*l.* to be settled by arbitration or jury at the option of the party claiming compensation.

S 23. If the compensation claimed or offered in any such case shall exceed fifty pounds and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but, unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

Appointment of arbitrator when questions are to be determined by arbitration.

S. 25. When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or, if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a

(c) "The Lands Clauses Consolidation (Scotland) Act, 1845," is the 8 & 9 Vict. c 19.

request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

S. 26. If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

Appointment of umpire.

S. 27. Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

Appointment of umpire on neglect of the arbitrators, in case of railway companies.

S. 28. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade (*b*), in any case in which a Railway Company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final.

If single arbitrator die matter to begin de novo.

S. 29. If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special act in the same manner as if such arbitrator had not been appointed.

If either arbitrator refuse to act the other to proceed ex parte.

S. 30. If where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make their award within twenty-one days the matter to go to the umpire.

S. 31. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

Power of arbitrators to call for books, &c.

S. 32. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which he or they may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Arbitrator or umpire to make a declaration.

S. 33. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration; that is to say,—

(*b*) The powers of the Board of Trade as to Railways have been transferred to the Commissioners of Railways by stat. 9 & 10 Vict. c. 105, s. 2.

8 & 9 Vict. c. 18.

"I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act [*naming the special act*].

"A. B.

"Made and subscribed in the presence of [ ]."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanor.

Costs of arbitration, how to be borne.

S. 34. All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

Award to be delivered to the promoters of the undertaking.

S. 35. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose.

Submission a rule of court.

S. 36. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.

Award not void through error in form.

S. 37. No award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form.

Purchase money and compensation, how to be estimated.

S. 63. In estimating the purchase-money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith.

Where compensation to absent party has been determined by a surveyor, the party may have the same submitted to arbitration.

S. 64. When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a surveyor, and deposited in the Bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands or such interest therein as aforesaid could not be found or was absent from the kingdom, if such owner or party shall be dissatisfied with such valuation it shall be lawful for him, before he shall have applied to the Court of Chancery for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted accordingly, in the same manner as in other cases of disputed compensation hereinbefore authorized or required to be submitted to arbitration.

Question to be submitted to the arbitrators.

S. 65. The question to be submitted to the arbitrators in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

If further sum awarded, promoters to pay or deposit same within fourteen days.

S. 66. If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the undertaking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof the same may be enforced by attachment, or recovered with costs by action or suit in any of the superior courts.

Costs of the arbitration.

S. 67. If the arbitrators shall determine that the sum so deposited was sufficient, the costs of and incident to such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators, but if the arbitrators shall determine that a further sum ought to be paid or deposited by the promoters of

the undertaking, all the costs of and incident to the arbitration shall be borne by the promoters of the undertaking.

To be settled by arbitration or jury, at the option of the party claiming compensation.

S. 68. If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts.

[By *s.* 105, *amount of compensation in respect of common or waste lands, and by s.* 114, *as to paying off mortgages prematurely, to be settled as in other cases of disputed compensation*].

Interests omitted to be purchased.

And with respect to interests in lands which have by mistake been omitted to be purchased, be it enacted as follows:

Promoters of the undertaking empowered to purchase interests in lands, the purchase whereof may have been omitted by mistake.

S. 124. If, at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special act, or any act incorporated therewith, they were authorized to purchase, and which shall be permanently required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed then within six months after the right thereto shall have been finally established by law in favor of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase-money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit.

8 & 9 Vict. c. 18.

S. 125. In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profit thereof, the jury, or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed.

How value of such lands to be estimated.

Sale of superfluous land.

And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:

[SS. 127, 128, 129, *provide that they shall be sold, and that the offer of purchase shall first be made to the owner of the land from which they were originally taken, then to the owners of adjoining lands*].

Differences as to price to be settled by arbitration.

S. 130. If any person entitled to such pre-emption be desirous of purchasing any such lands, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the costs of such arbitration shall be in the discretion of the arbitrators.

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8 & 9 Vict. c. 20.

8 & 9 Vict. c. 20.

An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the making of Railways (*d*). [8*th May*, 1845.]

[*By s.* 4, *the act may be cited as* "The Railways Clauses Consolidation Act, 1845." *By ss.* 6, 44, *the compensation for land taken or used for the purposes of the railway, or injuriously affected by its construction, and for damages in respect of such land, shall be ascertained and determined in the manner provided in "The Lands Clauses Consolidation Act*, 1845," *in respect of lands purchased or taken under its provisions.*]

Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:

Appointment of arbitrators when questions are to be determined by arbitration.

S. 126. When any dispute authorized or directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the Company, under the hand of the secretary or any two of the directors of the Company, and on the part of any other party, under the hand of such party, or if such party be a corporation aggregate, under the common seal of such Corporation, and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

S. 127. If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable to act, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing

(*d*) "The Railways Clauses Consolidation (Scotland) Act, 1845," is the 8 & 9 Vict. c. 33.

from the other party for that purpose he fail to do so the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or incapacity as aforesaid.

Appointment of umpire.

S. 128. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under this or the special act; and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final.

Board of Trade empowered to appoint an umpire, on neglect of the arbitrators.

S. 129. If in either of the cases aforesaid, the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, the Board of Trade shall, on the application of either party to such arbitration, appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act shall be final (*e*).

In case of death of single arbitrator the matter to begin de novo.

S, 130. If where a single arbitrator shall have been appointed, such arbitrator die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special act, in the same manner as if such arbitrator had not been appointed.

If either arbitrator refuse to act the other to proceed ex parte.

S. 131. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make award within 21 days, the matter to go to the umpire.

S. 132. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time, if any, as shall have been appointed for that purpose by both such arbitrators under their hands, the matter referred to them shall be determined by the umpire to be appointed as aforesaid.

Power for arbitrators to call for books, &c.

S. 133. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Arbitrator and umpire to make declaration.

S. 134. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him he shall, in the presence of a justice, make and subscribe to the following declaration; that is to say,—

"I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me, under the provisions of the act [*naming the special act*].

"A. B.

"Made and subscribed in the presence of [ ]."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanor.

Costs in discretion of arbitrators.

S. 135. Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators.

(*e*) The powers of the Board of Trade as to Railways have been transferred to the Commissioners of Railways by the stat. 9 & 10 Vict. c. 105, s. 2.

8 & 9 Vict. c. 20.

S. 136. The submission to any such arbitration may be made a rule of any of the superior courts, on application of either of the parties.

Submission a rule of court.

S. 137. No award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form.

Award not void for error in form.

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8 & 9 Vict. c. 118.

8 & 9 Vict. c. 118.

An Act to facilitate the inclosure and improvement of Commons and Lands held in common, the exchange of Lands, and the division of intermixed Lands; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local Inclosure Acts; and to provide for the revival of such powers in certain cases.

[*8th August*, 1845.]

Differences may be submitted to arbitration.

S. 60. Provided always, and be it enacted, that in case any person hereinbefore authorized to bring an action upon a feigned issue, [i. e. *any person claiming to be interested in land proposed to be inclosed*], and the person against whom such action might be brought, shall be desirous of submitting the matter in dispute or difference to the arbitration of any arbitrator, or of any arbitrators and umpire, it shall be lawful for such persons to submit such matter in dispute accordingly, and such submission shall be irrevocable, and the decision thereupon shall be binding on both parties, and be obeyed accordingly, and the costs of such arbitration shall abide the event; and the Commissioners may require each of the persons in difference upon any such submission to arbitration to give such security for the payment of the costs of such arbitration as the Commissioners shall think fit.

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9 & 10 Vict. c. 95.

9 & 10 Vict. c. 95.

An Act for the more easy recovery of Small Debts and Demands in England. [*28th Aug.* 1846.]

Suits may be settled by arbitration.

S. 77. And be it enacted, that the judge may in any case, with the consent of both parties to the suit, order the same, with or without other matters within the jurisdiction of the court in dispute between such parties to be referred to arbitration, to such person or persons, and in such manner, and on such terms as he shall think reasonable and just; and such reference shall not be revocable by either party except by consent of the judge; and the award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual to all intents as if given by the judge; provided that the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside any such award so given as aforesaid, or may, with the consent of both parties aforesaid, revoke the reference, or order another reference to be made in the manner aforesaid.

An Act for promoting the Public Health. [31*st Aug.* 1848.]

[*By the interpretation clause s.* 2, "The word 'arbitrators' shall include a single arbitrator; and the word 'arbitrators,' and 'arbitrator,' shall include an umpire."]

[*By s.* 3 *the act may be cited as* "The Public Health Act, 1848."

[*By s.* 75. *disputes with Waterworks Companies shall be settled by arbitration.*]

Mode of referring to arbitration.

8. 123. And be it enacted, that in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for,) and in case of any matter which by this act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment when made on the behalf of the Local Board of Health, shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in case of a corporate district, and on the behalf of any other party under his hand, or if such party be a corporation aggregate under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and after the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such matter shall have arisen, and notice in writing by one party who has himself duly appointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties; and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever.

Death, &c. of one of several arbitrators

S. 124. And be it enacted, that if before the determination of any matter so referred any arbitrator die, or refuse or become incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead; and if he fail so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed ex parte; and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrator in whose stead the appointment is made; and in case a single arbitrator die, or become incapable to act, before the making of his award, or fail to make his award within twenty-one days after his appointment, or within such extended time, if any, as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made.

Of single arbitrator.

Appointment of umpire by the parties; By Quarter Sessions.

S. 125. And be it enacted, that in case there be more than one arbitrator the arbitrators shall, before they enter upon the reference, appoint by writing under their hands an umpire, and if the person appointed to be umpire die, or become incapable to act, the arbitrators shall forthwith appoint another person in his stead; and in case the arbitrators neglect or refuse to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the Court of General or Quarter Sessions shall, on the application of any such party, appoint an umpire; and the award of the umpire shall be binding, final, and conclusive upon all persons and to all intents and purposes whatsoever; and in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time, if any, as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and the provisions of this act with respect

11 & 12 Vict. c. 63.

to the time for making an award, and with respect to extending to the same in the case of a single arbitrator, shall apply to an umpirage.

Time within which award must be made.

S. 126. Provided always, and be it enacted, that the time for making an award under this act shall not be extended beyond the period of three months from the date of the submission or from the day on which the umpire shall have been appointed (as the case may be).

Power to arbitrator to require production of documents.

S. 127. And be it enacted, that any arbitrator, arbitrators, or umpire, appointed by virtue of this act, may require the production of such documents in the possession or power of either party as they or he may think necessary for determining the matters referred, and may examine the parties or their witnesses on oath; and the costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or of the umpire (in case the matters referred are determined by an umpire under the power hereinbefore contained in that behalf;) and any submission to arbitration under the provisions of this act may be made a rule of any of the superior courts, on the application of any party thereto.

As to costs of reference.

Submission may be made a rule of court.

Declaration to be made by arbitrator and umpire.

S. 128. And be it enacted, that before any arbitrator or umpire shall enter upon any such reference as aforesaid, he shall make and subscribe the following declaration before a justice of the peace; (that is to say),

"I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the Public Health Act, 1848.

"A. B."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire shall wilfully act contrary to such declaration, he shall be guilty of a misdemeanor.

Compensation in case of damage by Local Board.

S. 144. And be it enacted, that full compensation shall be made, out of the general or special district rates to be levied under this act, to all persons sustaining any damage by reason of the exercise of any of the powers of this act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this act; or, if the compensation claimed do not exceed the sum of twenty pounds, the same may be ascertained by and recovered before justices in a summary manner.

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